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No. 85-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL COMPANY,

Appellant,

—against—

TEXACO, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The judgment below, which authorized a federal district court to interfere with pending state court proceedings by enjoining recourse to the statutes a state has adopted for adjusting the competing interests of judgment winners and losers pending appeal, presents the following questions:

1. May a federal court treat an injunction of state court proceedings as "expressly authorized" by 42 U.S.C. § 1983, and therefore exempt from the Anti-Injunction Act, by transforming into "the state" every private litigant who invokes state judicial proceedings and may call on state officers to help enforce the resulting judgment?

2. Having declared that enforcement of a private litigant's state court judgment is actionable under § 1983, may a federal court avoid the comity principles of *Younger v. Harris* by declaring that the state has no cognizable interest in such enforcement proceedings inasmuch as the underlying action was between private parties?

3. Do *Younger* principles permit a federal court to excuse deliberate bypass of judicial remedies in a state's appellate system where there is no procedural bar to full and fair state court consideration of a litigant's constitutional challenges?

4. Under this Court's *Rooker* and *Feldman* decisions, may a federal court that concededly lacks appellate authority under 28 U.S.C. § 1257 nonetheless review the validity of alleged state barriers to effective appeal on the theory that the private litigant's deliberate bypass of state judicial relief from those supposed barriers permits treating the federal case brought by that litigant as original rather than appellate in character?

5. May a federal court intervene in a pending state court appeal to invalidate and enjoin the state's judgment lien and supersedeas bond provisions on the theory that the Due Process Clause entitles a civil judgment debtor to an affordable stay of judgment pending appeal?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of this case, the State of Texas participated in the proceeding before the Court of Appeals for the Second Circuit as an Intervenor-Appellant. Pennzoil Company has no parent company or affiliates as those terms are used in Supreme Court Rule 28.1. Pennzoil's non-wholly-owned subsidiaries are:

National Transit Company
The Eureka Pipe Line Company
Proven Properties, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated February 20, 1986, is reported at 784 F.2d 1133, and is reprinted as Appendix A. The opinion of the United States District Court for the Southern District of New York, dated January 10, 1986, is reported at 626 F.Supp. 250, and is reprinted as Appendix D.

JURISDICTION

Texaco brought this action for injunctive relief in the United States District Court for the Southern District of New York under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343. The District Court granted a preliminary injunction on January 16, 1986, see Appendix B, against enforcement of certain Texas bond and lien statutes, on the ground, *inter alia*, that their application to Texaco would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Appendix D.* The United States Court of Appeals for the Second Circuit, affirming in part and reversing in part, sustained the injunction against the Texas provisions on due process grounds. See Appendix A. The judgment was entered on February 20, 1986, see Appendix F, and the mandate issued on March 13, 1986. Appellant's motion to recall the mandate and to clarify, modify or stay the judgment was denied by the Court of Appeals on March 27, 1986. See Appendix G. Appellant filed a timely Notice of Appeal to this Court in the United States Court of Appeals for the Second Circuit on March 21, 1986. See Appendix H. After remand, on April 8, 1986, the District Court entered an amended injunction barring enforcement of Pennzoil's Texas judgment until the completion of all appeals in Texas and to this Court under 28 U.S.C. § 1257. See Appendix C.

The Second Circuit, by affirming the grant of a preliminary injunction against Pennzoil, has conclusively held the Texas supersedeas bond and judgment lien provisions unconstitutional as applied, leaving no federal issue to be resolved below. This Court therefore has jurisdiction of this appeal under 28 U.S.C. § 1254(2). *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (per curiam); *Chicago v. Atchison, T. & S.F.R. Co.*, 357 U.S. 77, 82-83 (1958).

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* The District Court's Supplemental Findings of Fact are set forth in Appendix E.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, § 2283 of the United States Code provides that:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Texas Rule of Civil Procedure 364 provides:

> (a) *May Suspend Execution.* Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, or making the deposit provided by Rule 14c, payable to the appellee in the amount provided below, conditioned that the appellant shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or Court of Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him.
>
> (b) *Money Judgment.* When the judgment awards recovery of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs.

Texas Property Code, § 52.001 provides that:

> A first or subsequent abstract of judgment, when it is recorded and indexed in accordance with this chapter, constitutes a lien on the real property of the defendant located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing.

Texas Const. Art. I, § 13 is reprinted as Appendix K.

42 U.S.C. § 1983 is reprinted as Appendix L.

28 U.S.C. § 1257 is reprinted as Appendix M.

Texas Govt. Code § 22.002 is reprinted as Appendix N.

Fed.R.Civ.P. 62 is reprinted as Appendix O.

STATEMENT OF THE CASE

At issue in this case is the authority of federal district courts, notwithstanding the Anti-Injunction Act and judicially-crafted comity principles, to interfere with pending state court proceedings by enjoining recourse to the statutes a state has adopted for adjusting the competing interests of judgment winners and losers pending appeal. Apart from its intrinsic interest as a matter of judicial federalism, this issue is of surpassing practical significance not only in cases like this one, involving enormous sums, but in the thousands of routine cases in which litigants cannot afford to post a bond that would stay an adverse judgment pending appeal.

Pennzoil Company sued Texaco Inc. in a Texas state court in February 1984 for intentionally inducing the breach of Pennzoil's binding agreement to acquire 3/7 of Getty Oil Company. In a 4-½ month trial, Pennzoil, in the words of the Second Circuit Court of Appeals (A41),[1]

> established to the satisfaction of a Texas jury and judge that it was unlawfully injured by Texaco's tortious conduct, that as a reasult Pennzoil suffered enormous damages, and that Texaco's conduct was sufficiently egregious to require it in addition to pay punitive damages to the victim.

The jury awarded Pennzoil compensatory damages of $7.53 billion, based on Pennzoil's evidence of what it would cost to replace the vast oil reserves that Pennzoil would have acquired under its lost agreement with Getty. (Texaco introduced no evidence on the issue of damages.) The jury also awarded $3 billion in punitive damages, bringing the total judgment entered on December 10, 1985, including prejudgment interest and costs, to $11.12 billion. (A126-27).

Texas law, like that of most states, provides that a party wishing to appeal from a money judgment "may suspend the execution of the judgment by filing a good and sufficient bond

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1. Citations to the separately paginated appendices will be styled "A___."

. . ." Texas R. Civ. P. 364(a). To protect the rights of the prevailing party while the appeal is pending, Texas, like 30 other jurisdictions,[2] requires that the bond equal "at least the amount of the judgment, interest, and costs," *id.* 364(b), "[u]nless otherwise provided by law," *id.* 364(a).

A judgment debtor may appeal in Texas even without posting a supersedeas bond, but the prevailing party may then take steps to enforce its judgment while the appeal is pending. In particular, the judgment creditor may record its judgment in any Texas county and thereby acquire a lien on any property of the judgment debtor located in that county. Texas Prop. Code Ann. § 52.001.

No such threat of immediate enforcement existed with respect to Pennzoil's judgment against Texaco, however, for that judgment included, with the consent of both parties, so-called "stand-still" provisions carefully balanced to protect the interests of both litigants. See Appendix I. These provisions prohibited Pennzoil from taking any steps to enforce its judgment, and also barred Texaco from transferring or encumbering its assets except in the ordinary course of business, as long as the trial court retained jurisdiction of the case. (A127).

During this post-trial period, which lasted through March 25, 1986, Texaco was free to seek further relief in the Texas trial and appellate courts from the appeal bond and judgment lien provisions of Texas law, but it made no attempt to do so. Indeed, to this day, Texaco has never raised in a Texas court its objections to the validity or reasonableness of the Texas bond and lien provisions. Nor has Texaco moved in the Texas courts to obtain suitable alternative security arrangements, notwithstanding the fact that, after the judgment was entered, Pennzoil made a stipulation (Appendix J) in the Texas trial court waiving its right to a full bond and asking that court to fashion fair and suitable security under standards such as those contained in Fed.R.Civ.P. 62.

Several hours before the Texas court had even entered its judgment, Texaco, which had just given its consent to the stand-still provisions, filed suit against Pennzoil in the United

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2. See n.17 *infra*.

States District Court for the Southern District of New York (White Plains Division). Purporting to rely on 42 U.S.C. § 1983, and alleging that the Texas bond and lien provisions violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment (Complaint, Claims 3 and 6), Texaco asked the federal court in White Plains (a) to invalidate these wholly conventional security provisions, (b) to decide for itself what would be suitable security, and (c) to impose these arrangements on the Texas litigants and the Texas courts by means of an injunction. Texaco also sought immediate appellate review in the federal district court of the merits of the Texas judgment, alleging that that judgment burdened interstate commerce, frustrated the Williams Act, permitted Pennzoil to violate the Securities Exchange Act, and violated the Full Faith and Credit and Due Process Clauses of the Constitution (Claims 1, 2, 4, 5, and 7). (A5, A11, A57-58).

On December 17, 1985, Judge Brieant issued a temporary restraining order, and on January 16, 1986, he entered a preliminary injunction prohibiting Pennzoil from "taking any action of any kind whatsoever to enforce or attempt to enforce" its Texas judgment. (A52). The district court ruled that every one of Texaco's claims "raise[d] serious questions" about the "merits of the [Texas] judgment" (A63), that Texaco was likely to be successful in its Texas appeal (A62, A66), that no punitive damages should have been awarded (A64), and that compensatory damages "should in no event exceed $800 million" (A66). The court held the Texas statute requiring a supersedeas bond in the full amount of the judgment unconstitutional as applied to Texaco because it burdened Texaco's right to appeal to the Texas appellate courts, and to this Court under 28 U.S.C. § 1257, in violation of the Fourteenth Amendment. The district court required Texaco to post security of $1 billion as a condition for injunctive relief (A78), but otherwise left Texaco free to transfer or encumber the assets upon which Pennzoil would have to rely to collect its judgment.

On appeal, the United States Court of Appeals for the Second Circuit, on February 20, 1986, directed dismissal of all of Texaco's claims other than those attacking the Texas lien and bond provisions (Claims 3 and 6), holding that all but

those two claims could not be adjudicated by the federal courts since they had been litigated in the Texas courts. (A19-20). The court ruled that district court consideration of these claims would constitute an impermissible arrogation of appellate power: "reviewability of these claims by the Texas appellate courts and ultimately by the Supreme Court pursuant to 28 U.S.C. § 1257 precludes an inferior federal court from exercising jurisdiction over them." (A20).

But the Second Circuit reached a different conclusion with respect to Texaco's Claims 3 and 6—the claims challenging the Texas bond and lien provisions. The court reasoned that Texaco's deliberate decision *not* to raise the question of the validity of these provisions in the Texas state courts gave Texaco the right to raise that question in a federal court. (A21). It stated that cases such as *Monroe v. Pape*, 365 U.S. 167 (1961), and *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)—holding that a *plaintiff* with a constitutional claim under § 1983 may, as an original matter, choose to bring a federal action rather than having to sue as a plaintiff in the state courts—also give a *defendant* in a *pending* state court proceeding the option to carve out federal issues and take them to the "concurrent" jurisdiction of a federal court. (A21-22). This is permitted, the court concluded, whenever a state court litigant decides *not* to submit to the state courts the issue of the validity of any state rule that is not "inextricably intertwined" (A22) with claims that have been adjudicated in the state courts.

The Second Circuit held that the Anti-Injunction Act, 28 U.S.C. § 2283, was likewise no bar to Texaco's Claims 3 and 6, because these claims were properly brought pursuant to 42 U.S.C. § 1983. Relying upon this Court's decision in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the court below declared Pennzoil to be acting "under color of" state law because "[e]nforcement of the state court judgment . . . necessarily involves a panoply of activities undertaken together by Pennzoil and state officials, which constitute joint action for the purposes of § 1983." (A26).

On the other hand, the court of appeals ruled that, although there was "an ongoing state proceeding" (A32), the principles

of federalism and comity animating *Younger v. Harris*, 401 U.S. 37 (1971), did not prevent the district court from issuing its injunction against Pennzoil, because Pennzoil—even though held to be an arm of the state for "state-action" purposes—was, for *Younger* purposes, merely a "private litigant" and its dispute with Texaco merely "a suit between two private parties" (A34). An injunction against Pennzoil thus did not prevent action by "any arm of the state" (A34); and neither Texas' interest in "protecting the rights of its citizens to obtain and enforce judgments in the Texas Courts," nor its "interest in the constitutionality of its statutes," was "important" or "substantial." (A32).

The Second Circuit further held that abstention was not required because, in its opinion, the Texas state courts do not provide "adequate procedures for adjudicating Texaco's federal claims" (A35). Without identifying a procedural bar to such adjudication, the court simply observed that "[t]here is no assurance" that the Texas appellate courts would grant Texaco an "immediate stay of execution" pending a ruling on the federal claim, nor that they would fix security in an amount that the court of appeals would deem "reasonable" (A37-38).

As to the merits of Texaco's attack on the Texas lien and bond statutes, the Second Circuit concluded, in effect, that a judgment debtor has a Fourteenth Amendment right to an affordable bond, and thus "declare[d] the Texas lien and bond provisions to be unconstitutional . . . as applied" (A35): "[D]enial of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted . . . [would] amount[ ] to a confiscation of the judgment debtor's property without due process . . . [and] reduce its appeal to a meaningless ritual[,] [s]ince Texaco would be bankrupt or in liquidation by the time its appeals were decided . . . ." (A44). The Second Circuit proceeded to affirm the district court injunction prohibiting Pennzoil from taking any steps in the Texas courts to facilitate the enforcement of its judgment (A47-51), whether by invoking the lien and bond provisions, or by requesting other forms of protection to preserve the status quo.

Having affirmed injunctive relief for Texaco and having sustained the $1 billion bond ordered by the district court, the Second Circuit stated that further proceedings in the district court were "unnecessary" pending the disposition of the Texas appeal. (A48). The district court was to retain jurisdiction solely for the purpose of ruling on "any application with respect to the security terms of the injunction arising out of changed circumstances." (A51).

On March 21, 1986, contending that the decision below threatened to make its state court judgment uncollectable, Pennzoil moved the court of appeals to clarify, modify, or stay its judgment so that Pennzoil would at least be free to ask the Texas courts to extend the Texas trial court's "stand-still" order (see p. 2 *supra*) or otherwise to seek security in Texas apart from the Texas lien and bond provisions. The court of appeals denied this motion on March 27, 1986. See Appendix G.

THE QUESTIONS ARE SUBSTANTIAL

The judgment of the court below sanctions an unprecedented intrusion by a federal court into ongoing state court proceedings, opening a yawning breach in the wall of statutes and judicial doctrines erected by Congress and this Court as a barrier to just such intrusions. Despite that barrier, the Second Circuit ruled that a federal district court in New York may entertain a collateral attack on the validity of the application, in a Texas lawsuit, of Texas statutes governing security arrangements pending the appeal being pursued in that suit, and that the district court may displace those statutes and decide for itself what security is "reasonable" to protect the Texas judgment that Pennzoil won before a Texas jury and judge. The court of appeals turned the law on its head by insisting that the New York federal courts have this authority *because* Texaco deliberately bypassed the state courts and declined to present its constitutional objections in the ongoing Texas litigation.

The district court in White Plains has been given carte blanche to supplant the courts of Texas and to exercise continuing supervision over *pendente lite* security arrangements throughout the Texas litigation—preventing Pennzoil, on pain

of contempt, from pursuing *any* remedy in *any* Texas tribunal to protect its existing and—unless and until reversed—wholly lawful Texas judgment.

The Second Circuit accomplished this intrusion by constructing a contrived complex of exceptions to every one of the statutory and judicially elaborated comity rules that, in combination, embody the overarching principle that the state and federal judicial systems are independent and parallel, both subject to the governance of this Court, but without power—apart from exceptional and rigorously cabined circumstances—to supervise or interfere with each other's proceedings. By ruling that every state-court judgment winner becomes "an arm of the state" whenever there is any prospect that the state's judgment enforcement machinery will actually be engaged, the court below radically expanded the scope of § 1983's application to the private sector, while simultaneously contracting the application of the Anti-Injunction Act, 28 U.S.C. § 2283; it thus dramatically reduced the impact of the statute through which Congress, ever since 1793, has voiced its steadfast insistence that the federal courts may not interfere with state court proceedings.

Then, in an abrupt about-face, the court of appeals also took out of play the judicially-crafted rule of comity expounded in *Younger v. Harris*, on the ground that Pennzoil, having just been ruled a state actor for § 1983 purposes, is magically transformed into a purely private actor for *Younger* purposes. The court thereby created a capacious zone within which comity is simply inapplicable because *neither* § 2283 *nor* abstention is operative—the former being suspended because the federal action seeks relief under § 1983 against a state-court litigant who is deemed to wield the power of the state, and the latter because that same state court litigation is nevertheless said to involve merely private parties and private interests and therefore to be undeserving of comity.

Finally, the court of appeals ruled that Texaco's deliberate bypass of the Texas state courts affirmatively justified Texaco's excursion to the federal courts, rather than constituting a decisive obstacle to the exercise of federal jurisdiction. What had been vice thus became virtue: the very same failure to exhaust state procedures and appeals that would have denied

Texaco access to this Court pursuant to 28 U.S.C. § 1257, *see, e.g., Volkswagenwerk A.G. v. Falzon*, 461 U.S. 1303 (1983) (O'Connor, J., in chambers); *Costarelli v. Massachusetts*, 421 U.S. 193 (1975) (per curiam), was viewed by the Second Circuit as providing Texaco a privileged entree to a federal district court under § 1983. For Texaco's deliberate bypass was seized on by the court below as rendering inapplicable to this case the rule of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), which hold that only this Court has authority, under 28 U.S.C. § 1257, to review any judgment of a state court. According to the Second Circuit, this rule can be eluded by the simple expedient of failing to raise a question in a state proceeding and slicing it out for separate collateral litigation in a federal district court, thereby undermining the carefully articulated system devised by Congress for the orderly raising of federal questions in pending state court litigation, with review first in the state courts and ultimately in this Court.

The Second Circuit's ruling surely warrants plenary review. It invites all losing state court litigants to invent new maneuvers for side-swiping ongoing state court proceedings. It creates a no-man's land within which *none* of the relevant comity statutes and rules is operative—a jurisdictional darkling plain where litigants shanghaied from state courts clash by night. At a minimum, the decision below authorizes every state-court judgment debtor who is unable to satisfy a state's *pendente lite* security requirements to bypass the state courts and mount a collateral attack on those requirements. The court below created for the first time a right, enforceable in a federal district court, to an affordable bond pending an appeal from a state court judgment.

The attempt of the court of appeals to limit its ruling to the "unique" circumstances at hand—to fashion a special Rule in Texaco's Case—has no principled basis and, if accepted, would create substantial equal protection problems. Moreover, the Second Circuit's ruling cannot be limited to issues concerning the validity of state laws governing security pending appeal. Numerous state procedural and structural rules governing the processing of litigation from initial filing to final appellate judgment are vulnerable to imaginative constitutional objec-

tions. Under the ruling below, *all* of these are now subject to collateral attack by state court litigants who will exploit the Second Circuit's no-man's land unless this Court acts now to eliminate it.

A. THE SECOND CIRCUIT'S RULING EVISCERATES THE ANTI-INJUNCTION ACT.

The Anti-Injunction Act, in force since 1793, provides that a federal court may not enjoin state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Act is a linchpin of federal-state judicial relations, for "[o]bviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case." *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286 (1970). The "lines of demarcation" contained in the Act are designed to permit each court system to function "independently of the other with ultimate review in this Court of the federal questions raised in either system." *Id.* The effectiveness of the Act, and thus the integrity of the dual court system, are seriously threatened by the Second Circuit's decision in this case.[3]

The Second Circuit held the Anti-Injunction Act inapplicable on the ground that Texaco's due process claim against Pennzoil constituted an action authorized by 42 U.S.C. § 1983 and therefore, under this Court's ruling in *Mitchum v. Foster,* 407 U.S. 225 (1972), an action in which an injunction is "expressly authorized by Act of Congress." By this holding, the court below effected an unprecedented expansion in the application of § 1983 to private defendants and thereby imperiled the continued vitality of the Anti-Injunction Act.

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3. Although the injunction issued in this case was directed solely against Pennzoil, the Anti-Injunction Act—like the application of *Younger* abstention principles—"cannot be evaded by addressing the order to the parties or prohibiting utilization of the results of a completed state proceeding." *Atlantic Coast Line R.R. Co., supra,* 398 U.S. at 297.

1. The Holding Below Makes Every Judgment Winner A State Actor Suable Under § 1983.

For Texaco's federal action to qualify as a § 1983 action, and thus one exempted from § 2283 under *Mitchum v. Foster*, Pennzoil must be deemed "a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Relying on *Lugar*, the court of appeals held that Pennzoil fits into this category because, in order to enforce its judgment, "Pennzoil would have to act jointly with state agents by calling on state officials to attach and seize Texaco's assets." (A25).

This conclusion, which transforms into "the state" every state-court judgment winner who may call on state officers to help enforce his judgment, radically expands this Court's holding in *Lugar*—itself a decision that had extended the state-action concept. *Lugar* sustained a § 1983 claim against a private party who had invoked a state *pre*judgment attachment statute *before any judicial proceedings had occurred in the case*. The *Lugar* majority repeatedly stressed that the private party's joint action with state officials in that case involved a *pre*judgment attachment procedure, 457 U.S. at 927, 927 n.6, 932, and thus the judicially *un*supervised seizure by an *alleged* creditor of *disputed* property," *id.* at 933, 941 (emphasis added); the Court twice expressly stated that its holding "was limited to the particular context of prejudgment attachment." *Id.* at 939 n.21; *see id.* at 942.

In equating Texas' *post*-judgment, *post*-jury trial lien procedures with *Lugar*'s *pre*-judgment, *pre*-trial, *ex parte* attachment procedures, the Second Circuit completely ignored a fundamental and principled limitation on *Lugar*. When the state delegates to a private person the awesome power to interfere with others' property *before* there have been *any* judicial proceedings whatever, exercise of that power is subject to constitutional constraints.[4] But where a private person

4. *Lugar* thus falls within the line of cases including *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), *Lynch v. Household Finance*, 405 U.S. 538 (1972), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), which hold that the Due Process Clause requires a fair opportunity to be heard in connection with private creditors' resort to pre-judgment attachment, garnishment and

merely asks the state to help enforce a judgment duly rendered by a jury and confirmed by the courts, a holding that that private person has become the state simply because he has invoked normal state procedures completely obliterates the distinction between private and state action.

The critical line is between a state delegation permitting private parties "to substitute their judgment for that of [a] state official or body," *Cruz v. Donnelly*, 727 F.2d 79, 82 (3d Cir. 1984), and a system that allows a private person to invoke state process after the state has *itself* determined the relevant rights and liabilities.[5] Under the Second Circuit's reasoning, all trial winners who may at some point seek to enforce their judgments become state actors fully subject to all the substantive constraints of the Due Process and Equal Protection Clauses and vulnerable to suit under § 1983 with respect to any constitutional claims that can be conjured by disgruntled trial losers. But as this Court noted in *Dennis v. Sparks*, 449 U.S. 24, 28 (1980), "merely resorting to the courts and being on the winning side of a lawsuit" does not make a private party into a state actor under § 1983, any more than merely filing a complaint does. *Accord*, *Lugar, supra*, 457 U.S. at 939 n.21. The Second Circuit's decision conflicts both with that basic teaching and with the holdings of other courts of appeals.[6]

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replevin procedures. Federal relief is available only because such *pre*-judgment procedures—which involve no assertion of judicial authority and indeed often occur before a complaint as been served—do not constitute "proceeding[s] in state court." *Lynch, supra*, 405 U.S. at 553; *see id.* at 554-55.

5. The Second Circuit reasoned that, since "state officials can act only upon Pennzoil's unilateral determination" (A28) to collect the damages awarded it by a judge and jury, this is not a case in which "the independent judgment of the state judiciary is called into play" (A27-28). Apparently a 4½ month trial does not, in the opinion of the court below, sufficiently involve "the independent judgment of the state judiciary."

6. *See Earnest v. Lowentritt*, 690 F.2d 1198, 1201 (5th Cir. 1982) (initiation of mortgage foreclosure proceedings does not constitute state action); *Cobb v. Georgia Power Co.*, 757 F.2d 1248, 1252 (11th Cir. 1985) (regulated utility does not act "under color of" state law by obtaining a temporary restraining order from a state court). *See also Cruz v. Donnelly*,

2. So Sweeping a View of § 1983 Cannot Have Been Contemplated by *Mitchum v. Foster.*

By vastly expanding the application of § 1983 to private conduct, the holding below retroactively pumps new meaning into the exemption authorized by *Mitchum v. Foster* and thereby drastically erodes the force of the Anti-Injunction Act. That Act by its very terms comes into play only where state judicial proceedings have been invoked. But if the invocation of state judicial proceedings makes a private litigant a state actor whose conduct is actionable under § 1983 whenever a constitutional complaint against him can be invented, § 2283 will be cannibalized. Even if the Second Circuit's ruling is limited to state-court judgment winners, the result will be to render § 2283 inoperative with respect to federal court interference with state post-trial and appellate processes. Surely this is not what this Court contemplated when it decided *Mitchum v. Foster,* which was a real § 1983 action against a real government officer whose official activities constituted the sort of action at the core of Congress' concern when it "expressly authorized" injunctive relief under § 1983.

When asked to expand the coverage of § 1983, courts must consider what the expansion would do to the policies animating the Anti-Injunction Act. Such consideration is entirely missing from the analysis of the court of appeals. The court's approach entices state court judgment losers to mount collateral federal attacks on state court procedures regulating the enforcement of state judgments and other aspects of the state appeal process. It gives the lower federal courts a large and

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727 F.2d 79, 82 (3d Cir. 1984) (a store operator and employee were not "state actors" when they summoned police officers who strip-searched plaintiff).

Henry v. First Nat'l Bank, 595 F.2d 292 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), rendered prior to *Lugar* and animated by the now discredited notion that every state-court litigant has a *right* to have a federal court adjudicate his federal claims, is no longer good law even in the circuit in which it was decided. *See Cobb v. Georgia Power Co.* (11th Cir.) and *Earnest v. Lowentritt* (5th Cir.), *supra*. Moreover, the *Henry* court stressed that "the federal plaintiffs had exhausted all avenues of emergency state relief available to them," 595 F.2d at 302; *id.* at 296, before filing their federal suit, and they therefore confronted an "immediately enforceable" judgment. *Id.* at 299. Texaco, not having exhausted such avenues, confronts no such thing.

wholly unjustified zone within which to enjoin ongoing state proceedings.[7] The Second Circuit's holding therefore merits plenary review by this Court.

B. THE SECOND CIRCUIT'S JUDGMENT REPUDIATES THE COMITY RULES DEVELOPED BY THIS COURT UNDER *YOUNGER v. HARRIS*.

Even if the Anti-Injunction Act is held not to bar the injunction issued at Texaco's behest, the "national policy forbidding federal courts to stay or enjoin state proceedings except under special circumstances" would compel the same result here. *Younger v. Harris*, 401 U.S. 37, 41 (1971). For *Mitchum v. Foster, supra*, expressly held that the fact that a case is brought under § 1983 (and thus is technically exempt from § 2283) does not "qualify in any way the principles of equity, comity and federalism that must restrain a federal court when asked to enjoin a state court proceeding," 407 U.S. at 243. The Second Circuit's failure to heed this admonition undermines *Younger* and plainly deserves plenary review.

1. *Younger*'s Absention Rules Are Applicable Here.

The court of appeals escaped its obligation to follow *Younger* by ruling that the *Pennzoil v. Texaco* lawsuit was a purely "private" dispute that did not implicate any important state interests. After forcing Pennzoil into the garb of a § 1983

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7. The breadth of the injunction affirmed below illustrates the range of federal judicial intrusions portended by the Second Circuit's holding. For the injunction that the Second Circuit refused even to modify, see Appendix G, enjoins Pennzoil from going to the courts of Texas for *any* form of protection of its interests during the pendency of Texaco's appeal on the merits—even a mere extension of the bilateral stand-still that expired on March 26, 1986. Yet the *only* exception to § 2283 even *suggested* in this case—§ 1983—bears *at most* upon the injunction against the lien and bond provisions, the only Texas laws ever challenged by Texaco. Any bootstrap plea for jurisdiction over *unchallenged* Texas procedures as a means of effectuating the judgment against those that were challenged is powerful evidence that Texaco's purported § 1983 claim against the bond requirement is nothing more than a subterfuge for a collateral federal attack on the Texas judgment itself, resting on undifferentiated disdain and hostility toward the Texas judiciary.

state actor in order to evade the strictures of § 2283, the Second Circuit stripped Pennzoil of that same attire in order to escape the federal court abstention compelled in this case by *Younger*. Having previously declared that, for the purposes of §§ 1983 and 2283, "Pennzoil cannot be divorced from [the Texas] enforcement procedure merely because a court authorized execution of the judgment" (A26), the court below proceeded to divorce Texas itself from its own enforcement procedures by holding that "the state has no interest in the underlying action" in this case (A34).

The court of appeals thus created a zone within which *all* rules of comity are rendered entirely inoperative. It thereby made nonsense of the law. If Pennzoil is to be deemed "the state" for § 1983 purposes, this must be *because* its activities implicate the *public* powers of the state. But if the public powers of the state are in fact implicated, *Younger* concerns come into play for that very reason: the point of the *Younger* doctrine is to assure that the use of state courts for the effectuation of the state's public policies not be subject to federal interference, except in narrowly defined extraordinary circumstances. To conclude, as the court below did, that a § 1983 action is so private that it escapes *Younger* is a contradiction in terms: *by definition* the § 1983 action is an action against *public* authorities to curb the exercise of *public* power—power "under color . . . of state law"—and sensitivity to comity interests therefore becomes absolutely imperative.[8]

In holding *Younger* inapplicable, the court of appeals also disregarded both the specific holdings and the animating philosophy of this Court's cases in the *Younger* line.[9] Thus, in

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8. For this reason, the Court does not in this case have to decide the much-controverted question whether *Younger* should apply to "purely" private litigation. That question would, of course, be important only where § 2283 would not itself be a bar to an injunction. *Cf. Parson's Steel Inc. v. First Alabama Bank*, 106 S.Ct. 768, 773 (1986), where this Court directed the district court on remand of a private civil case "to decide the propriety of a federal-court injunction under the general principles of equity, comity, and federalism discussed in *Mitchum v. Foster*."

9. In *Juidice v. Vail*, 430 U.S. 327 (1977), this Court expressly warned against narrow and wooden interpretations of the *Younger* rule: "We now hold . . . that the principles of *Younger* and *Huffman* are not confined

Juidice v. Vail, 430 U.S. 327 (1977), the federal plaintiff was, like Texaco, a state court judgment debtor, and the judgment was also entered in a private civil lawsuit. There, as here, the federal claim was a § 1983 action challenging state laws and procedures enabling a successful plaintiff to protect his interest in the judgment—in that case, by moving for contempt in the event the adjudged debtor failed to appear for a deposition about the assets for satisfaction of the judgment. 430 U.S. at 329-30.

The Second Circuit's conclusion that "[h]ere the state has no interest in the underlying action" (A34), would have been just as apt—or inapt—in *Juidice*, where New York had no particular interest in the private financial dispute underlying the privately-taken deposition and the privately-issued subpoena. But just as New York had a substantial interest—requiring federal abstention—in "civil contempt proceedings . . . initiated by private parties to enforce compliance with subpoenas issued by private attorneys," *Vail v. Juidice*, 406 F.Supp. 951, 958 (S.D.N.Y. 1976), so Texas has a vital interest in the functioning and enforcement of its bond and lien laws, "process[es] through which [it] vindicates the regular operations of its judicial system," *Juidice v. Vail*, 430 U.S. at 335.

The court of appeals opined that to allow *Younger* to operate here "would broaden *Younger* to cover almost every § 1983 case and thus undermine the Supreme Court's holding in *Mitchum* that federal courts are empowered by § 1983 to enjoin ongoing state proceedings." (A32). But *Mitchum* itself made it absolutely clear that its ruling is not in any way "undermined" by the applicability of *Younger*; in fact, the Court *justified* its conclusion in *Mitchum* by noting that *Younger* comity principles will be operative even though § 2283 is not. *Mitchum* thus clearly stands for the proposition that, in *real* § 1983 actions seeking to enjoin *real* state officials and agencies from litigating in state courts, *Younger* is fully applicable.

The court below now holds that, when a self-styled § 1983 action is brought against private persons, federal injunctions

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solely to the type of state actions which were sought to be enjoined in those cases," 430 U.S. at 334.

may be granted entirely without comity constraints. This has the perverse result of making § 1983 a far more radical instrument for federal intervention against private litigants—who are at the margins of the policies of § 1983—than against the state officials who are the central focus of those policies.

When combined, the Second Circuit's § 1983 and *Younger* holdings spawn an entirely new and populous breed of federal lawsuits aimed at the actions of ordinary citizens and corporations who happen to have garnered an enforceable judgment in a state court. Since fundamental principles of comity do not apply in the no-man's land inhabited by this species of litigation, nothing remains to prevent such lawsuits from repeatedly disrupting pending state judicial proceedings. The Second Circuit's holding that *Younger* is entirely inapplicable to this case flies in the face of this Court's governing cases and creates an ominous gap in fundamental principles of comity. It consequently merits plenary review by this Court.

2. Remedies Under Texas Law Meet The *Younger* Requirements.

The Second Circuit held that Pennzoil had not satisfied another requirement for *Younger* abstention—namely, that the Texas state courts provide adequate procedures for the adjudication of Texaco's federal claims. (A35). Yet to this day, Texaco has made no attempt to raise its objections to the application of the Texas lien and bond provisions in the Texas courts. Texaco had three full months, during which the judgment was stayed by the stand-still order, to obtain a ruling from the trial court on the constitutionality of the lien and bond provisions and, absent a favorable ruling, to seek review in the Texas appellate courts, either by expedited direct appeal or by mandamus. The Second Circuit nevertheless concluded that it was unreasonable to ask Texaco initially to present its complaint about a Texas rule to the Texas court in which it was currently litigating. (A37-38).

The Second Circuit based its conclusion about lack of Texas procedures on a series of distrustful speculations about Texas law and Texas courts. The court below stated that it "appears unlikely" that Texaco "could have been assured" of a decision

on the constitutional issues by the Texas trial court (A35), and that there was "no assurance" that the Texas appellate courts would have granted relief to Texaco in a timely fashion if Texaco had sought that relief. (A37). The Second Circuit further speculated that seeking relief from the bond requirement in Texas would have been futile since the rule had consistently been enforced "as written," and therefore "the Texas trial judge would in all probability deny relief sought on constitutional grounds" (A36).

The focus of these speculations is entirely misplaced. The "pertinent inquiry" is *not* when and how the Texas courts might rule but whether "state procedural law *barred presentation* of [Texaco's] claims." *Moore v. Sims*, 442 U.S. 415, 432 (1979) (emphasis added). In the absence of such a bar, *Younger* abstention is required—and may not be waived on the basis of self-serving predictions that recourse to the state courts would be "futile" because those courts will rigidly apply as written the statutes the state court litigant seeks to challenge. No such procedural *bar* exists in this case, and the Second Circuit did not even suggest otherwise. Indeed, there is no indication that the Texas trial or appellate courts could not have fashioned an arrangement like the stand-still order pending appeal, particularly in view of Pennzoil's express stipulation in the Texas trial court that it would not demand the imposition of an appeal bond in the full amount of the judgment.[10]

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10. The Second Circuit denigrated Pennzoil's waiver of its state-created right to a full bond as a mere "unilateral request" to the Texas trial court to determine security pending appeal by applying the standards of Fed.R.Civ.P. 62. (A48). Yet if the challenged Texas lien and bond provisions indeed operate only upon Pennzoil's "unilateral determination" (A28), it is unclear at best how the Second Circuit found any Article III "case" or "controversy" over Pennzoil's hypothetical invocation of those provisions against Texaco, since Pennzoil expressly *waived* whatever "unilateral" rights those provisions conferred upon it. Pennzoil's waiver, duly filed in the Texas trial court as a "stipulation" pursuant to Texas practice (Appendix J), is effective as a matter of Texas law to bind Pennzoil. The lien and bond provisions were intended for the benefit of judgment creditors such as Pennzoil, and their waiver obviously does not adversely affect the rights of the judgment debtor—just the opposite. *See Yandell v. Tarrant State Bank*, 538 S.W.2d 684 (1978); *United Benefit Fire Ins. Co. v. Metro. Plumbing Co.*, 363 S.W.2d 843 (1962). Even the district court recognized that "consent" by Pennzoil would remove the alleged constitutional defect in the lien and bond statutes. (A68, A75).

If the burden the Texas bond requirement imposes on Texaco is as unprecedented and uniquely devastating as the Second Circuit evidently believed (*see* A39-40), there could be no reason short of general mistrust of the Texas courts to assume that those courts would remain unmoved and would blindly apply other bond precedents. "Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) (emphasis in original). The Second Circuit nevertheless indulged just that presumption—one which was especially inappropriate here. The Texas Supreme Court has repeatedly and emphatically held that the "open courts" provision of that State's own Constitution, Art. I, § 13, see Appendix K, *requires* a Texas court to suspend the literal operation of any statutory or other condition that, as a practical matter, renders unavailable the access to appellate courts that Texas law secures. Thus, in *Dillingham v. Putnam*, 109 Tex. 1, 5, 14 S.W. 303, 305 (1890), the court stated:

> "[A]n Act of the Legislature which makes the right . . . to prosecute an appeal . . . depend on the giving of a supersedeas bond, without reference to the ability or inability. . . to give such bond, is violative of the [Texas] Constitution."

See Nelson v. Krusen, 678 S.W.2d 918, 921 (Tex. 1984) (reaffirming *Dillingham*).[11]

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11. In *Pace v. McEwen*, 604 S.W.2d 231 (Tex.Civ.App. 1980), the Texas intermediate appellate court enjoined enforcement of a trial court order just ten days after entry because that order, requiring a judgment debtor to turn over real estate for sale in satisfaction of the judgment, effectively rendered the appeal meaningless. The *Pace* court viewed its injunction as necessary to preserve its own appellate jurisdiction, *id.* at 232-33, and further held that the trial court itself had the power to grant the same injunctive relief "to prevent damage to an appellant," *id.* at 233.

That power is codified by statute: Texas Civil Practice and Remedies Code § 65.013 provides that "[a]n injunction may not be granted to stay a judgment or proceeding at law except to stay as much of the recovery or cause of action as the complainant in his petition shows himself equitably entitled to be relieved against." This statutory authorization is particularly

Even if the Second Circuit were correct that, as a practical matter, the Texas courts could not or would not act with sufficient speed,[12] Texaco would have an available remedy in this Court under 28 U.S.C. § 1257, because Texaco would then have satisfied that statute's requirement of exhausting remedies in "the highest court of a state in which a decision could be had." *See Brown v. Texas*, 443 U.S. 47, 50 (1979). Thus, a Circuit Justice of this Court could grant a stay of the judgment pending appeal through the state system and review in this Court. *See, e.g., M.I.C. Ltd. v. Bedford Township*, 463 U.S. 1341, 1342-43 (1983) (Brennan, J., in chambers). *See also Nat'l Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (per curiam); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1327-29 (1975) (Blackmun, J., in chambers).

It is the central teaching of this Court's decisions that, throughout state court proceedings, litigants must exhaust their judicial remedies unless there is a clear "procedural bar" to the raising of the federal issue in the state courts. *Moore v. Sims*, *supra*, 442 U.S. at 430-31 n.13. This obligation includes the duty to exhaust the state appellate system. *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). The court of appeals gutted this rule by holding that a state litigant is free to withhold its federal claim from the state courts and resort to a federal court on the basis of abstract and hostile speculations about the effectiveness and timeliness of the state's remedial system. The result is an open incentive to state court litigants to carve particular issues out of pending cases and cart them to a federal district court in search of what they perceive to be a more favorable

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significant in light of the broadening language that was added to Rule 364 itself in 1984. As amended, that rule provides that execution of a judgment may be suspended only by the filing of a full supersedeas bond, "[u]nless otherwise provided by law. . . ." Tex.R.Civ.P. 364 (a).

12. *Pace* confirms that the Texas appellate courts are capable of hearing and deciding Texaco's petition for relief from Rule 364 in very short order indeed. Additional avenues by which Texaco could seek relief from the bonding requirement include a petition to the Texas Supreme Court for a writ of mandamus (*see* Tex. Gov't Code, § 22.002(a) (1986), reprinted in Appendix N), or an original proceeding for injunction in the Texas Court of Civil Appeals. *See Reyes v. Atkins*, 619 S.W.2d 26 (Tex. Civ. App. 1981).

resolution. Precisely the same mode of analysis would support piecemeal shopping trips to federal forums on numerous procedural and structural issues that can readily be labeled "collateral" and made the basis of a supposedly independent cause of action under § 1983. The upshot is to allow litigants to assemble jurisdictional sandwiches to suit their tastes—a state slice here, a federal slice there. This prospect is sufficient to merit this Court's plenary attention.

C. THE SECOND CIRCUIT'S DECISION INFRINGES UPON THIS COURT'S EXCLUSIVE JURISDICTION TO REVIEW STATE COURT JUDGMENTS UNDER 28 U.S.C. § 1257.

For more than sixty years, this Court has steadfastly maintained that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Even with respect to federal constitutional defects, "[r]eview of such judgments may be had only in this Court." *Id.* The sole recourse of the party alleging such a defect is to present its constitutional questions to the state courts in the first instance and ultimately to this Court on review. Any other rule would be irreconcilable with the principles of comity inherent in our dual court system. *See Atlantic Coast Line R.R. Co., supra*, 398 U.S. at 288.

The court below nonetheless held that the district court in White Plains had jurisdiction to grant relief with respect to Texaco's arguments against the Texas bond and lien provisions as applied to this $11 billion judgment because these arguments *had not been presented to the Texas trial court* and were not "inextricably intertwined" with claims that *had* been so presented. (A22-23). The Second Circuit reasoned that, as to issues that are unrelated "to the merits of [a] judgment" (A23, A41) and that the litigant has "chose[n] to withhold from the state court" (A21), the rule of *Monroe v. Pape* gives the federal courts an independent "concurrent" jurisdiction to which dissatisfied parties may resort without exhausting state remedies. That cannot be.

First, there is no authority whatever for the proposition that *Rooker-Feldman* applies only to substantive claims concerning the merits of a case and not to the numerous procedural and structural issues posed by the processing of state court litigation. Under 28 U.S.C. § 1257, this Court reviews "judgments or decrees", not issues; the enforceability of the judgment obtained by Pennzoil in Texas is the very matter that the courts below purported to review, and the very matter that those courts stayed.

Second, it is an error—and one placing the Second Circuit in conflict with the Fifth[13]—to suppose that the *Rooker-Feldman* doctrine may be limited to instances in which a federal court is literally asked to review the result of a state court adjudication. The whole point of that doctrine is that Congress has never conferred upon the lower federal courts the authority to *displace* state courts (and ultimately this Court) in the appellate process. It matters not whether such displacement takes the form of direct review by a lower federal court of a state court judgment, or the form of collateral federal attack on the validity, as applied to that judgment, of the state laws rendering the judgment immediately enforceable. For only the courts with jurisdiction to hear appeals have power to review and correct procedural barriers that limit the value of those appeals.[14]

Third, this Court's decision in *Huffman v. Pursue, Ltd.*, *supra*, explicitly rejects the notion that § 1983 provides a "concurrent" federal forum for constitutional claims even if

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13. *See Hale v. Harney*, No. 85-1472 (5th Cir. April 7, 1986), Slip Op. (upholding dismissal of complaint under *Rooker-Feldman* even though some of the constitutional challenges to Texas law had not been submitted to the Texas courts); *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3531 (1985).

14. On the Second Circuit's theory, Texaco should have been free to file its request for additional argument time before the Texas Court of Appeals not in that court, See Motion to Enlarge Time for Oral Argument in *Texaco v. Pennzoil*, No. 01-86-00216-CV, but as a civil rights action in federal district court, claiming that a 20-minute oral argument limit in a multibillion-dollar case makes the appeal an exercise in futility.

interference with pending state court proceedings results. Although a party normally need not exhaust state remedies before bringing a § 1983 action as an original matter, the *Huffman* Court noted that this principle has "nothing to do" with the issue of "the deference to be accorded state proceedings which have already been initiated and which afford a competent tribunal for the resolution of federal issues." 420 U.S. at 609 n.21.

Fourth, the Second Circuit's erroneous conclusion that Texaco's deliberate bypass of the Texas courts *opens*—rather than closes—the doors of the federal courthouse creates a looking-glass inversion of federalism that is all the more bewildering in the wake of this Court's opinion in *Feldman*. There the Court dealt with the bypass issue and concluded that bypassing the state courts did *not* authorize otherwise impermissible federal court litigation:

> [T]he fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does *not* mean that a United States district court should have jurisdiction over the claims. *By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court.*

460 U.S. at 482-84 n.16 (emphasis added).

As this Court observed in *Feldman*, "[t]his result is eminently defensible on policy grounds." *Id.* And the rule that executing an end-run around the state courts may make a federal forum unavailable for those constitutional claims is hardly unique to *Rooker-Feldman*: the same rule prevails under *Younger*; *see, e.g., Moore v. Sims*, *supra*, 442 U.S. at 432; *Huffman v. Pursue, Ltd.*, *supra*, 420 U.S. at 609; *Juidice v. Vail*, *supra*, 430 U.S. at 337; in the area of federal habeas corpus, *see, e.g., Fay v. Noia*, 372 U.S. 391 (1963); *Wainright v. Sykes*, 433 U.S. 72 (1977); and with respect to *res judicata* questions in § 1983 cases, *see, e.g., Migra v. Warren City School Dist.*, 465 U.S. 75 (1984). The contrary rule embraced by the Second Circuit's holding—begetting a species of "civil habeas corpus" without any exhaustion requirement—replaces

federal comity with an *anti*-comity principle and legitimates the familiar litigator's trick of "sand-bagging" issues. This topsy-turvy result, making the district court in a collateral proceeding a more potent and inviting forum than this Court on direct review, merits the plenary attention of this Court.

D. DUE PROCESS DOES NOT ENTITLE A CIVIL JUDGMENT DEBTOR TO A STAY PENDING APPEAL.

In addition to violating three distinct but related jurisdictional barriers in upholding the district court injunction, the Second Circuit concocted a novel due process right that is at odds with this Court's decisions.

In order to state a claim under § 1983, Texaco was required to show that it had been "deprived of a right 'secured by the Constitution and the laws' of the United States." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978), quoting 42 U.S.C. § 1983. The court of appeals reasoned that conditioning a stay of execution on Texaco's posting of a $12 billion supersedeas bond "would at least amount to a deprivation of [Texaco's] property in violation of its right to due process" (A24), since such a bond could force Texaco into bankruptcy "by the time its appeals were decided" (A44).

The Second Circuit's conclusion that Texaco has a due process right to avoid application of the Texas bond and lien provisions is both unprecedented and unwarranted. First, it is problematic whether any "deprivation" of a "judgment debtor's property" (A44) is at stake, since the amount in question has been adjudicated to be a debt Texaco owes to judgment creditor Pennzoil. Texaco cannot complain of being "deprived" of property which it no longer unqualifiedly "owns." Second, the transfer of ownership of that sum of money from Texaco to Pennzoil was hardly accomplished "without due process" (A44), for Texaco had notice of the claim against it and a full and fair opportunity to be heard: after a 4-½ month trial in a court of law, a jury found that Texaco had tortiously deprived Pennzoil of billions of dollars when it took away Getty's assets; Texaco has enjoyed the benefits of those wrongfully obtained billions for more than two years.

Due process does not require a state to go further and provide access to an appellate court. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Ohio v. Akron Park District*, 281 U.S. 74, 80 (1930). Of course, once Texas created an appellate system, the Constitution foreclosed the option of limiting the right of appeal by irrational or arbitrary requirements. *Evitts v. Lucey*, 105 S.Ct. 830, 840 (1985). But Texas has *not* limited Texaco's appeal rights: Texaco has in fact perfected its appeal by filing a notice of appeal and posting a small bond to cover appeal costs; and Texaco's prosecution of that appeal in no way depends upon its posting of any security for the judgment, upon its obtaining a stay of the judgment's execution, or upon a suspension of the Texas judgment lien provisions.

What the court below really held is that the Fourteenth Amendment denies Pennzoil the security Texas law deems necessary to protect its trial victory by entitling Texaco to avoid, pending appeal, the consequences of its trial loss. But until the ruling below, it was well established that a civil litigant has no due process right to be free from the execution of a judgment pending its appeal. In fact, this Court has expressly so held. In *National Union of Marine Cooks Stewards v. Arnold*, 348 U.S. 37 (1954), a judgment debtor refused to file a bond protecting the judgment creditor pending appeal and, in order to "safeguard the collectability" of the judgment, the state court dismissed the debtor's appeal. *Id.* at 41. This Court concluded that there had been no violation of the Due Process Clause, stating that "[w]here the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration." *Id.* at 44. *A fortiori* Texaco, with its right to appeal unaffected by the Texas appeal bond and judgment lien provisions, has no right to be free from security requirements pending appeal. There is "no obligation upon the State to provide for suspension of judgment" pending whatever appeal process it has made available. *Louisville & Nashville R. Co. v. Stewart*, 241 U.S. 261, 263 (1916) (unanimously holding that a state may require a 110% supersedeas bond pending appeal of a money judgment).

The Second Circuit nonetheless insists that Texas has imposed an irrational burden on Texaco's right to appeal by

requiring Texaco to post a $12 billion bond as a condition of a stay.[15] But there is nothing irrational in Texas' decision to safeguard fully the interests of those who have won judgments in Texas courts. States are free to strike their own balance between the interests of judgment creditors and those of judgment debtors. Some states, like Rhode Island, favor the debtor and require the trial court automatically to stay execution upon the filing of a notice of appeal,[16] without regard to the fact that this may leave the debtor free to encumber or transfer assets, rendering the judgment uncollectable in the event it is upheld on appeal. Many other states, like Texas, have decided that, once a trial is complete, the judgment creditor is entitled to assurance that it will be able to collect the award if it is ultimately affirmed. Nothing in the Due Process Clause empowers a federal court to arrogate to itself the authority to countermand that state policy choice simply because the federal tribunal might strike the balance differently or come to a different conclusion about the threat to the judgment creditor's interests.

For the Second Circuit to hold that Texaco is entitled, as a matter of federal law, essentially to proceed with business as usual, *as though the Texas trial court had never entered a judgment against Texaco*, is to hold that the Texas judicial system has no claim at all in the matter until all appeals within and from that system have been exhausted. To state that contention is to refute it: the most elementary axioms of respect for state judicial proceedings preclude reducing state court judgments, throughout the pendency of the state appellate process, to empty declarations of abstract rights—like so many "bequest[s] in a pauper's will," *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

The Second Circuit's adherence to a dubious due process theory which flies in the face of this Court's long-settled

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15. That is, *if* a full bond were in fact to be required—an issue that has, of course, never been resolved because Texaco has successfully prevented its resolution in the Texas courts.

16. R.I.R.Civ.P.62(c). Other states providing for automatic stay of execution upon appeal include Connecticut, Conn.R.Ct. § 3065; Maine, Me.R.Civ.P.62(e); Massachusetts, Mass.R.Civ.P.62(d); New Hampshire, N.H.Ct.R.Ann.74; and Vermont, Vt.R.Civ.P.62(e).

precedents is of more than academic interest. Texas is only one of 30 states (plus the District of Columbia) that presumptively require a supersedeas bond equal to or greater than the judgment as a condition to a stay of execution pending appeal.[17]

The threat to the orderly administration of justice in those jurisdictions posed by the judgment below requires this Court's plenary attention.

E. THERE IS NO PRINCIPLED WAY TO CONTAIN THE EXPANSION OF FEDERAL JURISDICTION WROUGHT BY THE JUDGMENT BELOW.

Apparently concerned that its ruling would open the doors to numerous federal intrusions into ongoing state court litiga-

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17. The law in 14 other states requires, like Texas Rule 364, the posting of at least a full bond: Alabama, Ala.R.CivP.62(d), Ala.R.App.P.8(a); Arkansas, Ark.R.Civ.P.62(d), Ark.R.App.P.8(c); Delaware, Del.Const., Art.IV, § 24, Del.R.Civ.P.62(d), Del.Sup.Ct.R.32(c); Iowa, Iowa R.App.P.7; Louisiana, La.Code Civ.P. Art. 2124 (West 1986); Michigan, Mich.R.Civ.P. 2.614(D), Mich.R.App.P. 7.101(H)(1)(c); Minnesota, Minn.R.Civ.P.62.03, Minn.R.App.P.108.01(3); Nebraska, Neb.Rev.Stat. § 25-1916(1) (Supp. 1981); New Mexico, N.M.R.Civ.P.62(d); New York, N.Y.Civ.Pract.Law § 5519(a)(2) (Consol.1978); Oklahoma, Okla.Stat.Ann. tit. 12, § 968 (West Supp.1985), Okla.R.Civ.App.P. 1.13; Oregon, Or.Rev.Stat. §§ 19.038, 19.040 & 19.045 (1981), Or.R.Civ.P.72(a); South Dakota, S.D.Codified Laws Ann. §§ 15-6-62(d), 15-26A-25, 15-26A-26 (1984); Virginia, Va.Code § 8.01-676.1(a) & (c) (1985).

Sixteen additional jurisdictions have laws presumptively requiring a full bond, but explicitly allowing the trial court some equitable discretion to reduce the size of the bond: Alaska, Alaska R.Civ.P.62(d), Alaska R.App.P.7(d); Arizona, Ariz.R.Civ.App.P.7(a); District of Columbia, D.C.R.Civ.P.62-I, D.C.R.App.P.8(b); Georgia, Ga.Code Ann. § 5-6-46(a) (1985); Idaho, Idaho R.Civ.P.62(d), Idaho R.App.P.13(b)(14); Indiana, Ind.R.Civ.P.62(d); Kansas, Kan.Stat.Ann. § 60-2103(d) (1983); Kentucky, Ky.R.Civ.P. 62.03 & 72.04; Maryland, Md.R.App.P.1018(b)(1); Mississippi, Miss.Code Ann. §§ 11-51-31 & 11-51-53 (Supp. 1985); Missouri, Mo.R.Civ.P.81.09(b); New Jersey, N.J.R.App.P.2:9-5 & 2:9-6; Pennsylvania, Pa.R.App.P.1731; Tennessee, Tenn.R.Civ.P.62.04 & 62.05; Washington, Wash.R.App.P.8.1(b); Wyoming, Wyo.R.Civ.P.62(d), Wyo.R.App.P.2.07. Such provisos cannot distinguish the rule in those states from the rule at issue here. For the nub of Texaco's complaint here must be that the *the particular bond demanded in this case* would work the same injury as immediate execution of Pennzoil's judgment. Had a $12 billion bond been set in the discretion of a Texas judge after a full hearing, Texaco could still go to a federal court to claim a violation of due process.

tion, the court of appeals purported to limit its decision to "the extraordinary circumstances of this case, which are unlikely ever again to recur," including the large amount of the judgment, the "clear inability" on the part of the judgment debtor to comply with the supersedeas bond requirement, and the "prospect" that the state courts would not rule on Texaco's constitutional objections before the judgement was enforced. (A50). The Second Circuit's effort to create a Rule in Texaco's Case limited solely to the particular facts of this litigation is unavailing.

Some 31 jurisdictions have statutory bond requirements as demanding as those of Texas, and nearly every jurisdiction in the nation requires a supersedeas bond under some circumstances. The judgment below exposes every one of these provisions to collateral, post-trial attack in the federal courts. Whenever a judgment debtor must post a bond—whether its size is set by statute or by a state court's discretion—large enough to threaten that debtor with the same irreversible injury that would accompany immediate execution of the judgment, the rationale of the Second Circuit would justify federal judicial intervention.

It is true, of course, that the size of the judgment against Texaco is unprecedented. But it is no larger, in relation to Texaco's assets, than thousands of judgments entered against less wealthy parties. It could be just as difficult or "impossible" for a "Mom-and-Pop" grocery store that had been held liable for $100,000 or even $10,000 in damages in a slip-and-fall tort action to post a bond in that amount as it is for Texaco to secure the Pennzoil judgment. Mom and Pop could likewise allege that execution of the judgment before the completion of the appeals process would leave their business—and perhaps their lives—irreversibly altered.[18] Such lawsuits and such judg-

18. And judgment *creditors* compelled by state courts to stay execution of their hard-won victories pending appeal, without the security of what those parties would deem an adequate bond, *see* n.16 *supra*, would no doubt dash to federal court for injunctions compelling the state tribunals to demand a larger bond or to permit immediate enforcement. A judgment creditor denied adequate security can readily allege that the state court or state rule which has risked making the judgment ultimately uncollectable has indeed worked irreversible harm and wrought an unconstitutional deprivation.

ments, accompanied by such circumstances, are quotidian, not "rare." Limiting the Rule to Texaco—or to large companies with large judgments against them—would be blatantly arbitrary and would create a wealth-based classification that itself would raise serious equal protection questions under the Due Process Clause of the Fifth Amendment.[19]

Indeed, the Rule in Texaco's Case cannot be confined to issues surrounding security pending appeal. The state statute books are stuffed with procedural and structural rules governing the processing of private disputes through the state trial and appellate courts, and the law reporters are filled with cases attacking the fairness and reasonableness of such rules and alleging that their enforcement would work irreparable harm. Under the Second Circuit's ruling, all these issues are easy prey to federal collateral attack during ongoing state proceedings; all that is needed is a deliberate bypass of the state courts and a bit of artful pleading to make it appear that the federal defendant is suable under § 1983 because his invocation of state judicial proceedings—whether before or after judgment—converts him into a state actor. Since that makes the Anti-Injunction Act inapplicable and since, under the ruling below, *Younger* is also inapplicable, the door is open to wide-scale evasions of this Court's comity rulings. Thus every litigant in state court is given a fielder's choice as to whether to pursue his remedies directly in the state's judicial system, with review

19. Nor can the rule propounded by the Second Circuit be confined in any principled way to litigation resulting in money judgments. The minimal principle for which the judgment below must stand is that federal relief is available under § 1983 whenever the losing party in state court civil litigation is accorded a right to appeal but is prevented, by a combination of state law and unavoidable circumstance, from staying execution of an adverse judgment pending appeal—provided such execution may cause "irreversible destruction" of some interest of the losing party (A50). But such irreversibility may be claimed whenever appellate victory could not wholly undo the consequences of a judgment's execution. Thus, in ordinary family disputes resulting in visitation decrees or custody awards, in various contract or property disputes ending in awards of specific performance with respect to some unique item, and in myriad tort cases leading to judgments granting equitable relief, the losing party may readily claim, just as Texaco did here, that the right of appeal provided by the state is irrationally fettered and unfairly rendered futile unless the state makes it possible for the loser to stay enforcement of the judgment pending appeal.

in this Court once state avenues have been exhausted, or to commence a collateral federal action under rules that reward deliberate bypass of the state's judicial system.

CONCLUSION

In its haste to provide immediate and unprecedented relief to Texaco notwithstanding the availability of the Texas state courts and this Court under § 1257 as forums where Texaco could present its constitutional claims in an orderly fashion, the Second Circuit has fundamentally altered the jurisdictional landscape. Weakened by the inconsistent and dubious exceptions pioneered by the court below, the Anti-Injunction Act, *Younger* abstention, and the *Rooker-Feldman* doctrine no longer clearly define the boundaries of the federal and state judicial systems. Dissatisfied state court litigants are free to roam across jurisdictional borders, disregarding comity and manipulating federal tribunals into supplanting state courts and state policies and supervising state procedures in pending state litigation. The logic that generated this federal intervention admits of no limiting principles and can be contained only by the most arbitrary of parameters. For these reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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May 1, 1986

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 883, 884—August Term 1985

Argued: February 11, 1986 Decided: February 20, 1986

Docket Nos. 86-7046, 86-7052

TEXACO INC.,

Plaintiff-Appellee,

—against—

PENNZOIL COMPANY,

Defendant-Appellant,

STATE OF TEXAS,

Intervenor.

Before:

LUMBARD, MANSFIELD and PIERCE,

Circuit Judges.

Appeal by Pennzoil Company from an order of the Southern District of New York, Brieant, *Judge*, granting

to Texaco Inc. a preliminary injunction restraining Pennzoil from enforcing a Texas state court money judgment in the sum of $11.12 billion pending appeals to the Texas appellate courts and the United States Supreme Court. The injunction was issued on the grounds that enforcement of the Texas judgment pending appeal would violate Texaco's constitutional and federal statutory rights.

Affirmed in part and reversed in part.

ARTHUR L. LIMAN, New York, NY, and LAURENCE H. TRIBE, Cambridge, MA (Mark A. Belnick, Gerard E. Harper, Brad S. Karp, Stephen M. Merkel, Paul, Weiss, Rifkind, Wharton & Garrison, New York, NY; John L. Jeffers, Jr., G. Irvin Terrell, Baker & Botts, Houston, TX; Paul M. Bator, Mayer, Brown & Platt, Chicago, IL, of counsel), *for Appellant Pennzoil Company.*

DAVID BOIES, New York, NY, and PAUL J. CURRAN, New York, NY (Thomas D. Barr, Max R. Shulman, Francis P. Barron, Stephen S. Madsen, William F. Duker, Stephen D. Poss, Robert B. Silver, Rosemary Q. Barry, Richard L. Crisona, Nicholas A. Gravante, Jr., Linda C. McClain, Dominic Surprenant, Cravath, Swaine & Moore, New York, NY; Milton J. Schubin, Randolph S. Sherman, Ira S. Sacks, David R. Garcia,

J. Clark Kelso, Kaye, Scholer, Fierman, Hays & Handler, New York, NY, of counsel), *for Appellee Texaco Inc.*

JIM MATTOX, Attorney General, State of Texas, Austin, TX (Mary F. Keller, Executive Assistant, J. Patrick Wiseman, Assistant Attorney General, W. Robert Gray, Assistant Attorney General, of counsel), *for Intervenor State of Texas.*

Amici briefs have been received from the following:

State of Alabama
State of Alaska
State of California
State of Delaware
State of Florida
State of Kansas
State of Montana
NAACP
State of New Mexico
State of New York
U.S. Senator Alfonse M. D'Amato
Rep. Hamilton Fish, Jr. and 24 Other Members of U.S. Congress from New York
The Business Council of New York
State of Oklahoma
Attorney General of State of Oklahoma
Hon. Jack Brooks and 12 Other Members of U.S. Congress from Texas
State of Washington
State of Wyoming

Henry Fowler, W. Michael Blumenthal, G. William Miller and William E. Simon, former Secretaries of the U.S. Treasury

The Committee of Concerned Employees and Retirees (Stockholders) of Texaco Inc.

MANSFIELD, *Circuit Judge*:

Pennzoil Company ("Pennzoil"), a Delaware corporation with its principal place of business in Texas, appeals an order of the Southern District of New York, Brieant, *Judge*, granting to Texaco Inc. ("Texaco"), a Delaware corporation based in New York, a preliminary injunction restraining Pennzoil from seeking to enforce a judgment entered on December 10, 1985, by the Texas state court for the 151st Judicial District in the sum of $11.12 billion (including punitive damages, pre-judgment interest and costs) in Pennzoil's favor against Texaco.[1] The Texas judgment, handed down after a four-and-one-half month jury trial, was based on the jury's findings with respect to special issues propounded by the court.

In substance the jury found that Texaco had knowingly and intentionally interfered with a pending agreement between Getty Oil Co. ("Getty") and Pennzoil, which was negotiated in New York, for the latter's acquisition of approximately 3/7ths of Getty's outstanding shares at $110.00 per share plus certain additional consideration

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1 Upon the district judge's invitation the State of Texas intervened as a party pursuant to 28 U.S.C. § 2403(b) and has also appealed.

and that Pennzoil was entitled to $7.53 billion compensatory damages and $3 billion punitive damages. The stock was eventually sold by Getty to Texaco at a higher price ($128 per share) than that found to have been agreed upon between Getty and Pennzoil.

The present action was commenced by Texaco's filing of its complaint in the Southern District of New York on December 10, 1985. The complaint set forth seven claims (described *infra* at pp. 9-10) alleging that the Texas judgment and enforcement of it through use of Texas lien and supersedeas bond provisions (described *infra* at pp. 6-7) would violate its rights under the Commerce, Supremacy, Full Faith and Credit, Due Process and Equal Protection Clauses of our federal Constitution, as well as under the Civil Rights Act of 1871, 42 U.S.C. § 1983, the Securities Exchange Act of 1934, 15 U.S.C. § 78, and Rules promulgated by the S.E.C. under the latter Act.

We hold that the district court had jurisdiction over the Third and Sixth Claims of Texaco's Amended Complaint (due process and equal protection) in the present action and that the grant of preliminary injunctive relief based on them does not represent an abuse of judicial discretion since it is supported by undisputed facts that satisfy well-established standards for preliminary injunctive relief. However, all other claims asserted in Texaco's complaint must be dismissed for lack of subject matter jurisdiction since they seek appellate review on the merits of the Texas judgment in violation of 28 U.S.C. § 1257 as interpreted by the United States Supreme Court.[2] *See*

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2 28 U.S.C. § 1257 provides in pertinent part:

"§ 1257. State courts; appeal; certiorari

"Final judgments or decrees rendered by the highest court of a

(Footnote continued on following page)

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). The injunctive relief issued by the district court on the Third and Sixth Claims of the Amended Complaint is affirmed. The case is remanded with directions to dismiss the First, Second, Fourth, Fifth and Seventh Claims.

The principal issues in the Texas case were whether Getty had entered into an agreement with Pennzoil, whether Texaco had according to the law of New York tortiously interfered with that contract, and, if so, what damages were suffered by Pennzoil as a result of Texaco's conduct. Following the jury's special findings in Pennzoil's favor on these issues the Texas trial judge, Hon. Solomon Casseb, denied Texaco's motion for judgment n.o.v., which was sought on various grounds, including all of those alleged in the present federal action except those alleged in the Third and Sixth Claims. On December 10, 1985, Judge Casseb entered judgment in favor of Pennzoil against Texaco in the sum of $7.53 billion compensatory damages, $3 billion punitive damages and $624,753,662 prejudgment interest to December 9, 1985, from which $33,777,551.17 was subtracted according to a stipulation filed by Pennzoil. The judgment totalled $11,120,976,110.83 and provided that post-judgment in-

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(Footnote continued from previous page)

> State in which a decision could be had, may be reviewed by the Supreme Court as follows:
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> * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

terest would be recoverable by Pennzoil at the rate of 10% per annum until the judgment was paid. Texaco's motion for a new trial remains pending before Judge Casseb.

With the consent of the parties, Par. 7 of the judgment, in order to preserve the status quo as long as the trial court had jurisdiction of the case, prohibited Pennzoil, during the pendency of the proceeding before the trial judge, from seeking to enforce the judgment and barred Texaco from encumbering its assets except "in the routine and ordinary course of business". The purpose of Par. 7 was to avoid the possible collapse and liquidation or bankruptcy of Texaco that might be precipitated by the sudden financial crisis it faced as a result of the astronomical amount awarded against it. However, this relief would be short-lived since it would expire when the Texas trial court lost jurisdiction over the case, which could occur as early as 30 days after the trial judge's denial of Texaco's motion for a new trial and at the latest on March 25, 1986.[3] Thus, Texaco could anticipate that if

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3 If the Texas trial court denies Texaco's motion for a new trial, it will, under Tex. R. Civ. P. 329(b), retain jurisdiction over the case for, at most, 105 days after December 10, 1985 (the date the trial court signed the judgment). Its jurisdiction would therefore terminate on March 25, 1986. Under Tex. R. Civ. P. 329(b)(a) a party may move for a new trial within 30 days after the judgment complained of has been signed. Texaco complied with this procedure.

Under Tex. R. Civ. P. 329(b)(c) the trial judge then has 75 days from the day he signed the judgment in which to rule on the motion. If he does not rule within that period, i.e., by February 23, 1986, the motion will be denied by operation of law. Regardless of the means by which the motion is denied, the judge retains jurisdiction over the case for 30 days after its denial. Tex. R. Civ. P. 329(b)(e). After the 30-day period, however, the trial court's plenary jurisdiction ceases. Tex. R. Civ. P. 329(b)(f).

Accordingly if Judge Casseb denies the motion before February 23, he will retain jurisdiction over the case for 30 days thereafter. If he does not rule on the motion, Texas law will consider it to have been

Judge Casseb denied the motion on the same day it was filed, January 9, 1986 (as he did with respect to the motion for judgment n.o.v.) Par. 7 would expire by February 10, 1986.

Upon the expiration of Par. 7 of the Texas judgment, Texaco would, absent injunctive relief, again face a financial crisis of staggering proportions, which could not under Texas law be avoided without Pennzoil's consent. Rule 364 of the Texas Rules of Civil Procedure requires Texaco, in order to stay execution of the judgment against it pending its appeal, to post a supersedeas bond, payable to Pennzoil, "in at least the amount of judgment, interest and costs,"[4] or more than $12 billion since interest accumulates at the rate of approximately $3 million per day. In addition, Tex. Prop. Code Ann. §§ 52.001 *et seq.* (Vernon 1983), provides that an abstract of judgment presented by the judgment creditor (Pennzoil), when properly recorded and indexed, constitutes a lien "on the property of the defendant located in the county in which

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denied on February 23. The court will then retain jurisdiction for 30 more days, i.e., until March 25.

4 Tex. R. Civ. P. 364 provides in part:

"Rule 364. Supersedeas Bond or Deposit

"(a) May Suspend Execution. Unless otherwise provided by law or these rules, an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk, or making the deposit provided by Rule 14c, payable to the appellee in the amount provided below, conditioned that the appellant shall prosecute his appeal or writ of error with effect and, in case the judgment of the Supreme Court or Court of Appeals shall be against him, he shall perform its judgment, sentence or decree and pay all such damages as said court may award against him.

"(b) Money Judgment. When the judgment awards recover of a sum of money, the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs."

the abstract was recorded and indexed . . .". *Id.* § 52.001. Texaco's real property in the State of Texas is estimated to be worth $5 billion.

Needless to say, Texaco could not possibly meet the mandatory bond requirement. It is estimated that the world-wide surety bond capacity ranges from $1 billion to $1.5 billion under the best possible circumstances. In addition, full collateralization would be required for a bond of such huge proportions. Texaco does not have sufficient liquid or immediately-liquidatable assets to post $12 billion in cash or cash equivalents and still retain sufficient liquid assets to operate its business. Moreover, it would be unable, because of the terms of its unsubordinated debt securities, to borrow $12 billion by mortgaging or pledging its assets. A lien of such proportions would seriously impair its ability to carry on its business with the result that it would probably be forced into bankruptcy or liquidation.

Under Texas law, relief from the harsh strictures of Rule 364 is not immediately available to Texaco. The Rule's terms have repeatedly been declared by Texas courts to be mandatory, requiring that the supersedeas bond be in at least the amount of the judgment, interest and costs and prohibiting the requirement from being partially superseded. *Mudd v. Mudd*, 665 S.W.2d 128, 130 (Tex. Civ. App. 1983); *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. Civ. App. 1983); *Kennesaw Life & Accident Ins. Co. v. Streetman*, 644 S.W.2d 915, 917 (Tex. Civ. App. 1983); *Haney Elec. Co. v. Hurst*, 608 S.W.2d 355, 356 (Tex. Civ. App. 1980); *Cooper v. Bowser*, 583 S.W.2d 805, 807 (Tex. Civ. App. 1979); *Schrader v. Garcia*, 512 S.W.2d 830, 831 (Tex. Civ. App. 1974). This interpretation has been adopted by the Texas Sub-

committee on Interpretation of Rules, 4 Tex. Civ. Code Ann., pp. 159-60 (Vernon 1985). Although Texaco could mount an attack in the Texas courts on the Rule, by motion and mandamus, on the ground that it is unconstitutional as applied in this case, the likelihood of obtaining a definitive constitutional ruling in the short period of time available to it appears extremely slim, at least without full cooperation on the part of Pennzoil. In the meantime Pennzoil, upon expiration of Par. 7 of the judgment, would have the right to execute its judgment, rendering even a favorable Texas court constitutional ruling "too little, too late".

Immediately following entry of the Texas judgment on December 10, 1985, Texaco, because of uncertainties regarding the meaning and effect of Par. 7 and the knowledge that it would shortly expire when the trial court lost jurisdiction, faced a serious crisis. Its bonds were downgraded and its credit lines shrank. Unsecured borrowing became unavailable and even secured financing uncertain. Suppliers, joint venturers, and purchasers of Texaco assets shied away from dealing with it, in part because many of those dealings would of necessity involve commitments beyond March 25, 1986, the last date when Par. 7 would be effective. An effort by Texaco on December 13, 1985, to obtain a hearing from the Texas trial court to consider modification of Par. 7 failed when Pennzoil would not agree to meet on dates specified by the court (Dec. 16, 17 or 18) and no alternative dates were made available.

On December 17, 1985, Texaco moved by order to show cause in the Southern District of New York, where Texaco has its principal place of business and personal jurisdiction over Pennzoil could be obtained, for a tem-

porary restraining order and preliminary injunction against Pennzoil's taking any action to enforce the Texas judgment. The Amended Complaint alleged (1) that the Texas judgment excessively burdened interstate commerce in violation of the Commerce Clause and frustrated the purposes of the Williams Act, 15 U.S.C. §§ 78m(d)-(e), 78n(d)(f), by deterring competitive tender offers after a target company (in this case Getty) and a given bidder (Pennzoil) had conducted negotiations (First and Second Claims[5]); (2) that the Texas lien and supersedeas bond provisions, by preventing Texaco from effectively prosecuting appeals to the Texas Court of Civil Appeals, the Texas Supreme Court, and eventually to the United States Supreme Court under 28 U.S.C. § 1257(2), were void under the Supremacy, Due Process and Equal Protection Clauses of the United States Constitution (Third and Sixth Claims); (3) that the Texas judgment permitted Pennzoil to engage in unlawful conduct in violation of the Securities Exchange Act, 15 U.S.C. § 78j, 78m, 78n and Rule 10b-13 thereunder, 17 C.F.R. § 240.10b-13, namely, the purchase of Getty stock other than pursuant to Pennzoil's outstanding tender offer (Fourth Claim); (4) that the judgment violated the Full Faith and Credit Clause by disregarding the substantive law of New York, which the parties agreed governed (Fifth Claim); and (5) that the judgment was the product of fundamental unfairness in violation of the Due Process Clause (Seventh Claim).

Pending a hearing on Texaco's motion, Judge Brieant on December 17, 1985, issued a temporary restraining

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5 Although Texaco labels each claim as a "cause of action", we prefer to use the term "claim", in accordance with the Federal Rules of Civil Procedure. *See, e.g.*, Fed. R. Civ. P. 8.

order. On December 20, 1985, Pennzoil cross-moved for dissolution of the restraining order and dismissal of the complaint for lack of jurisdiction and failure to state a claim. On the same date Pennzoil tendered to Texaco for filing in the Texas action a "stipulation" under which the Texas trial judge's power to issue a stay in that proceeding would be governed by the same supersedeas bond provisions as those governing federal actions under Fed. R. Civ. P. 62. The offer, which was renewed upon argument of this appeal, has not been accepted by the Texas trial judge or by Texaco.

Both sides having waived the taking of oral testimony, the district court on January 10, 1986, filed its findings and conclusions in an opinion granting Texaco's application for preliminary relief and denying Pennzoil's cross-motion. The district court found that absent injunctive relief Texaco would, pending appeal from the Texas judgment, suffer irreparable injury from enforcement of the Texas supersedeas bond and lien provisions since it would be unable to post a bond in the sum of approximately $12 billion required by Tex. R. Civ. P. 364(b) or continue to conduct business operations while subject to liens under Tex. Prop. Code Ann. §§ 52.001 *et seq.* (Vernon 1983), with the result that it would probably be forced into bankruptcy or liquidation. The result would be catastrophic for thousands of Texaco employees, stockholders and suppliers located throughout the United States and world-wide and would threaten serious harm to the national economy and the public.

The district court next concluded that Texaco's appeal of the Texas judgment stood a substantial likelihood of success, at least in reducing the award of $11.12 billion damages. It reasoned that the impropriety of awarding

punitive damages would be "quite obvious" to a Texas reviewing court and that the award had a "negative impact" on the federal policy expressed in the Securities Exchange Act of insuring that stockholders (in this case of Getty) derive the benefit of the best tender offer price. Using market prices of Getty stock as an indicator, the district court reasoned that, assuming the validity of the Texas jury's finding of tortious interference with the Getty-Pennzoil contract, the compensatory damages to Pennzoil "should in no event exceed $800 Million" if Pennzoil's bargain included the ultimate opportunity to control Getty.

Turning to the claims asserted by Texaco in the present federal suit, the district court, after using a balancing of interests test derived from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), concluded that Texaco's claim that the Texas bonding and lien provisions violated its Due Process and Equal Protection rights had a clear probability of success. The district court further held, on the basis of the Supreme Court's recent decision in *Marrese v. American Academy of Orthopaedic Surgeons*, ____ U.S. ____, 105 S. Ct. 1327 (1985), that enforcement of Texaco's federal securities law claims would not be precluded by the Texas judgment and that since federal courts had exclusive jurisdiction over them, 15 U.S.C. § 78aa, they would survive regardless of the ultimate outcome of the Texas suit. In so holding, the court cited the Supreme Court's decision in *Rooker, supra*, but did not discuss its applicability or that of 28 U.S.C. § 1257 to any of Texaco's claims in the present federal action.

The district court also refused Pennzoil's request that the court deny injunctive relief on grounds of federalism and comity. The federal Anti-Injunction Statute, 28

U.S.C. § 2283, was held inapplicable for the reason that actions under the Civil Rights Act, 42 U.S.C. § 1983, such as the present one, are expressly excepted from its application. *Mitchum v. Foster*, 407 U.S. 225 (1972). On the question of whether the present complaint stated a valid claim for relief under 42 U.S.C. § 1983, the district court followed the Fifth Circuit's decision in *Henry v. First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), in which that court in a § 1983 action upheld a preliminary injunction against private enforcement of a state court tort judgment pending appeal on the ground, among others, that application of a state supersedeas bond requirement would violate the plaintiff's federal constitutional rights.

Abstention under the principles of *Younger v. Harris*, 401 U.S. 37 (1971), was denied on the ground that no impairment of a vital state interest was shown. The court reasoned that an injunction would not adversely affect the operation of the Texas judicial system but, on the contrary, would facilitate its proper functioning by permitting Texaco's appeal to be heard and decided. Abstention under the principle of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), was denied on the ground that, since the Texas bond and lien provisions were clear and mandatory, the constitutional issues could not be avoided by a state court interpretation of them.

In order to protect Pennzoil against Texaco's transferring or encumbering assets that would otherwise be available to Pennzoil if an appeal of the Texas judgment should end in Pennzoil's favor, the district court's January 16, 1986, order required Texaco as a condition of injunctive relief to post security in the sum of $1 billion subject to the proviso that additional security might be

required after further hearing. The $1 billion figure was arrived at on the basis of the district court's determination that, at most, Pennzoil's compensatory damages in the Texas action should amount to $800 million, to which the court added $200 million for interest, costs and attorney's fees. On February 5, 1986, Texaco posted security in the sum of $1 billion.

DISCUSSION

The Existence of Federal Jurisdiction

The threshold questions are (1) whether federal jurisdiction exists that would permit a federal court to rule on Texaco's constitutional and federal law claims, and, if so, (2) whether the district court should, in the interests of comity and federalism, have abstained from exercising that jurisdiction in order to permit Texas courts to rule on those claims.

Pennzoil, relying on the Supreme Court's decisions in *District of Columbia Court of Appeals v. Feldman*, *supra*, *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, *supra*, and *Rooker v. Fidelity Trust Co.*, *supra*, argues that the only courts empowered to entertain claims of constitutional error in a Texas state court judgment are the Texas appellate courts and the Supreme Court of the United States. Texas law guarantees a right to review by its appellate courts of lower state court decisions. *Texas State Constitution*, Art. I, §§ 13 and 19; *Stroud v. Ward*, 36 S.W.2d 590, 591 (Tex. Civ. App. 1931). Title 28 U.S.C. § 1257(2), in turn, grants to the United States Supreme Court appellate review of state court judgments. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975); *Cohen v. California*, 403 U.S. 15, 18 (1971).

In *Rooker* the Supreme Court, in refusing to permit a losing state court litigant to invoke federal jurisdiction to attack a state court judgment on the ground that it had unconstitutionally misapplied state law, held that an appeal through the state courts to the Supreme Court constituted the exclusive procedure by which the judgment might be reviewed for constitutional error and that under the predecessor of § 1257 (Judicial Code, § 237, as amended September 6, 1916, c. 448, § 2, 39 Stat. 726),

> "If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. . . . Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character. . . . To do so would be an exercise of appellate jurisdiction." *Rooker, supra*, 263 U.S. at 415-16.

The *Rooker* doctrine has been reaffirmed by the Supreme Court. In *Atlantic Coast Line R. Co., supra*, 398 U.S. at 296, the Court stated:

> "Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. If [the party seeking the injunction] was adversely affected by the state court's decision, it was free to seek vindication of its federal right in the [state] appellate courts and ultimately, if necessary, in this Court."

In *Feldman*, *supra*, 460 U.S. at 476, the Court once again recognized the viability of *Rooker*, stating:

> "The District of Columbia Circuit properly acknowledged that the United States District Court is without authority to review final determinations of the District of Columbia Court of Appeals in judicial proceedings. Review of such determinations can be obtained only in this Court. See 28 U.S.C. § 1257."

In short, an inferior federal court established by Congress pursuant to Art. III, § 1, of the Constitution may not act as an appellate tribunal for the purpose of overruling a state court judgment, even though the judgment may rest on an erroneous resolution of constitutional or federal law issues. The exclusive procedure for federal review is that specified by 28 U.S.C. § 1257.[6]

The rationale behind the *Rooker-Feldman* principle is clear and sound. In this nation we have two "essentially separate legal systems." *Atlantic Coast Line R. Co.*, *supra*, 398 U.S. at 286. "[T]his dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and 'to prevent needless friction between state and federal courts,' *Oklahoma Packing Co. v. Gas Co.*, 309 U.S. 4, 9 (1940), it was necessary to work out lines of demarcation between the two systems." *Id.*

Texaco contends that the *Rooker-Feldman* doctrine does not apply to collateral federal attacks on state

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6 The habeas corpus jurisdiction of the lower federal courts is a constitutionally authorized exception to the principle of *Rooker-Feldman*. *See Sumner v. Mata*, 449 U.S. 539, 543-44 (1981) ("even a single federal judge may overturn the judgment of the highest court of a State" in adjudicating a petition for habeas corpus relief).

judgments that have not attained appellate finality. We disagree and know of no decision so holding. Indeed, courts, including the Supreme Court, have not hesitated to apply the *Rooker-Feldman* doctrine to judgments which Texaco would label as "non-final". *Atlantic Coast Line R. Co.*, *supra*, 398 U.S. at 296 (remedy for party adversely affected by lower state court judgment was to appeal to the state appellate courts, not to seek a federal injunction). *Thomas v. Kadish*, 748 F.2d 276, 282 (5th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 3531 (1985); *Community Action Group v. City of Columbus*, 473 F.2d 966, 973 (5th Cir. 1973); *Pilkinton v. Pilkinton*, 389 F.2d 32, 33 (8th Cir.), *cert. denied*, 392 U.S. 906 (1968).

Although the state judgments in *Rooker* and *Feldman* had survived appeal in the state court system, that fact was not advanced by the Supreme Court as a basis for, or as a condition to, its decisions. Rather the doctrine stems from recognition that (1) state courts are just as obligated and competent as federal courts to decide federal constitutional questions, *Moore v. Sims*, 442 U.S. 415, 430 (1979); *Huffman*, *supra*, 420 U.S. at 610-11, (2) a path is available through the state appellate system to the Supreme Court, and that (3) waste of judicial resources and unnecessary friction between state and federal courts might ensue if a federal district court intervened to overrule a state court decision. *Atlantic Coast Line R. Co.*, *supra*, 398 U.S. at 286. Allowing lower federal courts to review the judgments of state lower courts is as intrusive and as likely to breed antagonism between state and federal systems as allowing federal court review of the judgments of the states' highest courts. Indeed, if *Rooker-Feldman* only barred federal review of judgments

which had been fully appealed through the state system, it would foster federal/state rivalry by creating incentives for disappointed state court appellants to forum-shop, jumping over to federal courts instead of appealing their cases to the states' highest tribunals. Once a litigant has received an adverse adjudication on a constitutional issue from the state court, the state adjudication is just as final for the purpose of applying the *Rooker-Feldman* doctrine as it would be for purposes of appeal.

Applying the foregoing principles, we are satisfied that the *Rooker-Feldman* doctrine was clearly violated by much of the district court's decision. Many of the judge's conclusions with respect to the merits of the Texas action, despite his lip-service disclaimer, constitute what amounts to an impermissible appellate review of issues that have already been adjudicated by the Texas trial court. These include his statements to the effect (1) that an award of punitive damages in the Texas action was improper, which a "reviewing court in Texas will find . . . quite obvious," (2) that the $3 billion punitive damage award violates the policy expressed in federal securities laws, over which the federal court has exclusive jurisdiction, (3) that the Texas award of $7.53 billion was "absurd", and (4) that the compensatory damage award in the Texas action "should in no event exceed $800 Million". The proper fora for appellate review of these matters are the Texas appellate courts and eventually the Supreme Court of the United States. Moreover, the district court violated the *Rooker-Feldman* doctrine in holding that it had jurisdiction over all constitutional and federal statutory claims asserted by Texaco and that it would retain jurisdiction of them pending appeal through the Texas courts. Each of Texaco's constitutional and federal claims except those stated

by it in its Third and Sixth Claims were raised by it as defenses in the Texas lawsuit and adjudicated against it.[7] The review-ability of these claims by the Texas appellate courts and ultimately by the Supreme Court pursuant to 28 U.S.C. § 1257 precludes an inferior federal court from exercising jurisdiction over them.[8]

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[7] Texaco raised its due process challenges to the trial itself in its motion to recuse Judge Farris, the Judge who presided over three-fourths of the case, and in its motion for a mistrial. It raised each of its other federal claims, except the due process and equal protection challenges to the Texas bond and lien provisions, in its memorandum in support of its motion for judgment notwithstanding the verdict. That document's Table of Contents reads:

"IV. EVEN IF PENNZOIL DID ENTER INTO A CONTRACT, IT WAS VOID AND UNENFORCEABLE; IT CANNOT, THEREFORE, BE USED AS A PREDICATE FOR A TORTIOUS INTERFERENCE CLAIM

A. THE ALLEGED CONTRACT WOULD HAVE VIOLATED SEC RULE 10b-13

* * * * *

"IX. TEXACO IS ENTITLED TO JUDGMENT AS A MATTER OF FEDERAL CONSTITUTIONAL LAW

A. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE COMMERCE CLAUSE

B. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE SUPREMACY CLAUSE

C. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE FULL FAITH AND CREDIT CLAUSE

D. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE EQUAL PROTECTION CLAUSE

E. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE TAKINGS CLAUSE

F. ENTRY OF JUDGMENT AGAINST TEXACO WOULD VIOLATE THE DUE PROCESS CLAUSE"

[8] The district court held that Texaco's claims under the Securities and Exchange Act of 1934 are not barred by *res judicata* because they are matters of exclusive federal jurisdiction. 15 U.S.C. § 78aa. The court relied on *Marrese v. American Academy of Orthopaedic Surgeons*, ___ U.S. ___ 105 S. Ct. 1327 (1985), for the proposition that a statutory grant of exclusive jurisdiction may create an exception to the general rule that decisions of state courts be accorded full faith and credit by federal courts. 28 U.S.C. § 1738. The court concluded that 15

Texaco's Third and Sixth Claims stand on a different footing from its other asserted grounds of relief—they were not presented to the state trial court. Although a state court judgment has claim-preclusive effect in federal court, *Migra v. Warren City School Dist.*, 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980), Pennzoil does not contend that that rule bars Texaco's claims here. Rather, Pennzoil contends that Texaco's claims are barred because *Rooker-Feldman* should be read broadly to preclude federal review of issues which a party could have raised in the state court proceeding, but chose to withhold from the state court. We disagree.

Aside from the absence of any support for Pennzoil's theory in any decision applying *Rooker-Feldman*, the theory would read 28 U.S.C. § 1257 to severely impair, perhaps negate, a litigant's right to gain equitable or other relief under 42 U.S.C. § 1983, *Mitchum v. Foster*, 407 U.S. 225 (1972), since most claims under § 1983, especially requests to enjoin ongoing state proceedings, could be raised in a related state proceeding. To relegate the § 1983 claimant in such cases to the state court would ignore Congress' purpose in adopting that statute. Section 1983 was intended "to provide dual or concurrent

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U.S.C. § 78aa is such an exception and that the Texas court's rejection of Texaco's defenses based on federal securities laws were therefore not binding on a federal court. This was error.

In *Murphy v. Gallagher*, 761 F.2d 878 (2d Cir. 1985), we held that 15 U.S.C. § 78aa does not create an exception to the general requirement of full faith and credit. Since federal law does not bar state courts from exercising jurisdiction over defenses based on the Securities and Exchange Act of 1934, *see, e.g.*, *Will v. Calvert Fire Ins.*, 437 U.S. 655 (1978); *Weiner v. Shearson, Hammill & Co.*, 521 F.2d 817, 822 (9th Cir. 1975); *Shareholders Management v. Gregory*, 449 F.2d 326, 327 (9th Cir. 1971); *Aetna State Bank v. Altheimer*, 430 F.2d 750, 754 (7th Cir. 1970), state court determinations relating to those issues are binding on subsequent federal court proceedings to the extent required by 28 U.S.C. § 1738.

forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Patsy v. Florida Board of Regents*, 457 U.S. 496, 506 (1982). *See also Allen v. McCurry, supra*, 449 U.S. at 99. Accordingly, it is settled law that a § 1983 litigant need not first seek to vindicate his federal claims in state court before turning to a federal court for relief. *Patsy, supra*; *Board of Regents v. Tomanino*, 446 U.S. 478, 491 (1980); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Indeed, the Court has recognized, in the context of criminal proceedings, that a litigant who is not collaterally estopped from raising a § 1983 claim, is not precluded from raising the same claim simply because he had an opportunity to raise it in an earlier state proceeding. *Haring v. Prosise*, 462 U.S. 306, 318-23 (1983). Application of these principles is appropriate here because Texaco did not choose the Texas state court for resolution of the claims between the parties but was summoned into that court by Pennzoil. Texaco was not, therefore, engaged in forum-shopping when it sought relief under § 1983 in the Southern District of New York.

In accordance with the foregoing, we hold that the district court is barred by the *Rooker-Feldman* doctrine from exercising jurisdiction over the First, Second, Fourth, Fifth and Seventh Claims of Texaco's complaint and that they must be dismissed for lack of subject matter jurisdiction. *Rooker*, however, does not bar a federal court from exercising jurisdiction over the Third and Sixth Claims, which allege that the Texas automatic and mandatory lien and supersedeas bond provisions deny Texaco due process and equal protection as applied. Those claims have never been presented to or adjudicated by a state court. Nor are they "inextricably intertwined"

with the barred claims. *Feldman*, *supra*, 460 U.S. at 482-83 n.16. Aside from the fact that our adjudication of the Third and Sixth Claims is not a collateral attack on the merits of the Texas judgment, Texaco, which did not choose the Texas state court forum, does not have a fair opportunity to seek and obtain a timely final resolution of those claims from the Texas courts and the Supreme Court before it will suffer irreparable harm because of the Texas lien and bonding provisions. See p. 35, *infra*. *Wood v. Orange County*, 715 F.2d 1543, 1547 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984). Our decision, therefore, does not displace any state court adjudication or offend basic principles of comity and federalism.

Whether the Complaint States a § 1983 Claim, Including State Action

The next question is whether the Third and Sixth Claims, as illuminated by the affidavits of both sides with respect to the need for preliminary relief, state the essential elements of an action under § 1983. That statute was intended to "interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law." *Patsy*, *supra*, 457 U.S. at 503 (quoting *Mitchum*, *supra*, 407 U.S. at 242). In order to maintain a § 1983 claim, however, a litigant must allege and show deprivation (1) of a right "secured by the Constitution and laws of the United States", (2) by a defendant acting under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978).

The first element of a § 1983 action—threatened deprivation of a constitutional right—is adequately alleged in the complaint and supported by the parties' affidavits.

The undisputed facts indicate that the automatic enforcement of the Texas lien and bond requirements against Texaco's property to the extent of $12 billion lacks any rational basis, since it would destroy Texaco and render its right to appeal in Texas an exercise in futility. This would at least amount to a deprivation of its property in violation of its right to due process under the Constitution. *Evitts v. Lucey*, ____ U.S. ____, 105 S. Ct. 830, 840 (1985).[9]

The presence of the second essential element of a § 1983 action is more difficult to resolve. The Supreme Court has enunciated a two-step test for determining whether conduct resulting in the deprivation of a federal right is "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

> "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*

Texaco has satisfied the first prong of this test since Texas state law provides for enforcement of the judgment unless Texaco posts a supersedeas bond in the full amount of the judgment. Tex. R. Civ. P. 364(b), *supra*. Pennzoil contends, however, that it cannot fairly be termed a "state

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9 We discuss Texaco's due process claim more fully *infra* at 43-45.

actor" and that the suit therefore fails to meet the second prong of the test. Resolution of this issue calls for a factual inquiry into the relationship between Pennzoil and the State of Texas that would result from Pennzoil's enforcement of the judgment. *See Lugar, supra*, at 939 (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961)).

To enforce the judgment, Pennzoil would have to act jointly with state agents by calling on state officials to attach and seize Texaco's assets. A judgment creditor must first obtain a writ of execution, which is "a process of the court from which it is issued." Tex. R. Civ. P. 622. The writ is "directed to any sheriff or any constable within the State of Texas" and must be signed by the clerk or justice and bear the seal of the court. Tex. R. Civ. P. 629. Furthermore, the writ "shall require the officer to execute according to its terms." *Id.* Finally, when, as here, the judgment requires payment of money, the writ "must require the officer to satisfy the judgment and costs out of the property of the judgment debtor subject to execution by law." Tex. R. Civ. P. 630. When the sheriff or constable receives the writ, Texas law commands that "he shall proceed without delay to levy the same upon the property of the defendant". Tex. R. Civ. P. 637. Property levied upon pursuant to the writ of execution may ultimately be seized by the officer and liquidated to satisfy the judgment. Tex. R. Civ. P. 646a, 649.

In addition, Texas law authorizes the placement of judgment liens upon Texaco's property in the state immediately upon entry of judgment. Tex. Prop. Code Ann. § 52.001. Such liens are acquired by requesting state officials to undertake a series of acts. Pennzoil must obtain a certified abstract of the judgment from the clerk

of the court which rendered judgment. *Id.* § 52.002. The abstract must contain certain information required by law. *Id.* § 52.003. The county clerk must then record the abstract in the county judgment record and enter it in the index to the record. *Id.* § 52.004.

Enforcement of the state court judgment therefore necessarily involves a panoply of activities undertaken together by Pennzoil and state officials, which constitutes joint action for the purposes of § 1983. In *Lugar v. Edmondson Oil Co.* the Supreme Court concluded that a private party who invoked Virginia's prejudgment attachment procedure acted jointly with the state. *Lugar, supra*, 457 U.S. at 942. The Virginia prejudgment attachment procedure, like the Texas procedure at issue here, provided that a private party could obtain a writ from the clerk of the state court and have the writ executed by a county sheriff. *Id.* at 924-25. Under the Virginia law, the sheriff was only empowered to attach the property, while its owner retained possession. The Texas procedure, however, goes further and permits seizure by a Texas sheriff of attached property. We conclude, as the Supreme Court did in *Lugar*, that the "private use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment" and § 1983. *Id.* at 933.

A different result is not compelled by the fact that *Lugar* involved a prejudgment attachment whereas the attachment here would be pursuant to a court judgment. The presence of a court judgment does not alter the fact that Texas state officials execute the judgment only at Pennzoil's behest. Pennzoil cannot be divorced from that execution procedure merely because a court authorized execution of the judgment. Indeed, to so hold would

preclude the victim from obtaining relief against the party who must act jointly with the state official to unleash the unconstitutional state government action. To limit the *Lugar* rationale to prejudgment attachments would violate the precept that § 1983 provides a remedy "as broad as the protection of the Fourteenth Amendment affords the individual". *Lugar, supra*, at 934.

Our ruling in *Dieffenbach v. Attorney General of Vermont*, 604 F.2d 187 (2d Cir. 1979), supports the conclusion that a party acting pursuant to a state court judgment is not necessarily insulated from the reach of § 1983. In *Dieffenbach* we found that a bank was subject to suit under § 1983 when it utilized an allegedly unconstitutional foreclosure procedure to enforce a judgment against a mortgagor. We noted that in order to execute the judgment the bank was required to obtain a decree of foreclosure and that possession could only be gained by obtaining a writ from the clerk of the court which must be executed by a sheriff. *Id.* at 194 and n.12.

Finally, we note that Texaco's challenge to the state bond and lien provisions does not call into question the validity of the underlying judgment. Thus this is not a case where a private party is alleged to be a state actor merely because it brought suit and sought a judicial ruling. *See Dennis v. Sparks*, 449 U.S. 24, 28 (1980); *cf. Cobb v. Georgia Power Co.*, 757 F.2d 1248 (11th Cir. 1985) (party who seeks temporary restraining order is not joint actor with judge who issues the order); *Dahlberg v. Becker*, 748 F.2d 85, 92-93 (2d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S. Ct. 1845 (1985) (private party did not act jointly with state when she misused lawful state procedure and judge inadvertently issued contempt order). In such a case the independent judgment of the state

judiciary is called into play, and unless unusual circumstances are shown, *see, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162-71 (1970); *cf. United States v. Price*, 383 U.S. 787, 794-96 (1966) (18 U.S.C. § 242), a private party cannot be charged with responsibility for a judicial decision. Rather, Texaco claims that the state enforcement procedures are unconstitutional as applied. Since Texas law directs state officials to do Pennzoil's bidding in executing the judgment, it is the decision of Pennzoil, not that of the state judiciary, to utilize state agents to undertake the collection process, and the state officials can act only upon Pennzoil's unilateral determination. *Lugar, supra*, 457 U.S. at 941.

The facts of this case, therefore, compel the conclusion that in enforcing the Texas state court judgment, Pennzoil must, of necessity, act jointly with the state of Texas.

Having concluded that federal jurisdiction exists over the § 1983 claims asserted in Texaco's Third and Sixth Claims, we need not tarry over Pennzoil's argument that injunctive relief against enforcement of the Texas action is barred by the Anti-Injunction Act, 28 U.S.C. § 2283, which prohibits federal courts from enjoining state judicial proceedings "except as expressly authorized by Act of Congress".[10] Since an action under § 1983 constitutes just such an exception, *Mitchum, supra*, § 2283 does not bar Texaco's claims.

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10 28 U.S.C. § 2283 reads:

"§ 2283. Stay of State court proceedings

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Whether Abstention from Exercise of Federal Jurisdiction is Required

There remains the question of whether federal jurisdiction over the § 1983 claims must be exercised or whether we should refrain from doing so under the doctrine of "abstention". In certain circumstances, concern for federalism, comity, and judicial economy suggests that federal courts abstain from entertaining § 1983 cases. Abstention, however, is the exception, not the rule. *Hawaii Housing Authority v. Midkiff*, ____ U.S. ____, 104 S. Ct. 2321, 2327 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 15 (1983); *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, *rehearing denied*, 426 U.S. 912 (1976). It is appropriate in only four relatively well-defined circumstances. *Moses H. Cone*, *supra*, 460 U.S. at 13-16; *Colorado River*, *supra*, 424 U.S. at 814-19. Pennzoil contends that two of those circumstances exist here.[11] We disagree.

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11 Pennzoil concedes that two of the four circumstances, the so-called *Burford* exception, named after *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and the "exceptional circumstances" doctrine enunciated in *Colorado River*, *supra*, 424 U.S. at 818, do not apply in the present case. *Burford* calls for federal courts to decline jurisdiction "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case at bar . . . [or when] exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern", *Colorado River*, *supra*, 424 U.S. at 814. The "exceptional circumstances" doctrine applies to the rare case where "consideration of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation" demand abstention. *Moses H. Cone*, *supra*, 460 U.S. at 15 (quoting *Colorado River*, *supra*, 424 U.S. at 817). Courts must weigh a range of factors when determining whether "exceptional circumstances" abstention is in order. *Moses H. Cone*, *supra*, 460 U.S. at 15-16.

One of the two abstention doctrines urged upon us by Pennzoil, which was formulated by the Supreme Court in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501 (1941), establishes that "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Authority, supra*, 104 S. Ct. at 2327. *See also Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n.11 (1977). When determining whether *Pullman* demands abstention in a particular case, however, "the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts *might* render adjudication of the federal question unnecessary. Rather . . . abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction." *Hawaii Housing Authority, supra*, 104 S. Ct. at 2327. Accordingly, *Pullman* abstention is not appropriate merely to give the state court a first chance to vindicate a federal claim, *Zwickler v. Koota*, 389 U.S. 241, 251 (1967), or when the possibility that state courts will provide a construction limiting the statute is "too speculative to justify or require avoidance of the question presented." *Ohio Bureau of Employment, supra*, 431 U.S. at 481.

The meaning of the Texas lien and bond provisions is far from uncertain. On the contrary, the language of Tex. R. Civ. P. 364 and Tex. Prop. Code Ann. §§ 52.001 *et seq.*, is crystal clear. To suspend enforcement of a judgment pending appeal the appellant must post a bond in at least the full amount of the judgment. *See* Texas court decisions cited *supra*, pp. 7-8. Texas courts have refused to reduce supersedeas bonds below the amount dictated

by Rule 364 even though the party seeking to appeal the decision claimed he could not post the required amount. *Mudd v. Mudd*, 665 S.W.2d 128 (Tex Civ. App. 1983). Indeed, Rule 364's predecessor, Art. 2270, Vernon's Ann. Civ. Stat., was similarly construed by Texas courts. *Anderson v. Pioneer Building & Loan Ass'n*, 150 S.W.2d 445 (Tex. Civ. App. 1941) (refusing to stay foreclosure and sale of home of 66-year-old woman, whose only income was her old-age pension, because she could not post supersedeas bond equal to the value of house). *See also Elliott v. Lester*, 126 S.W.2d 756, 759 (Tex. Civ. App. 1939); *Bryan v. Luhning*, 106 S.W.2d 403, 404-05 (Tex. Civ. App. 1937); *Dunlap v. Rotge*, 85 S.W.2d 650, 651 (Tex. Civ. App. 1935); *Cleveland v. Alpine Lumber Co.*, 70 S.W.2d 257, 257 (Tex. Civ. App. 1934).[12] Since there is nothing unclear or uncertain about the Texas lien and bond provisions here and the mere possibility that the Texas courts would find Rule 364 unconstitutional as applied does not call for *Pullman* abstention, *Zwickler, supra*, 389 U.S. at 251, this type of abstention cannot be justified.

Pennzoil also argues that *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny required the district court to

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12 *Dillingham v. Putnam*, 14 S.W. 303 (Tex. 1890) (quoted with approval in *Nelson v. Krusen*, 678 S.W.2d 918, 921-22 (Tex. 1984)), held that a law conditioning the right of appeal on posting a supersedeas bond, regardless of whether appellant could post the bond, violated the Texas constitution's guarantee of the right to appeal. The law, however, unlike the lien and bond provisions at issue here, barred litigants from appealing. The cases cited *supra* demonstrate that the Texas courts have not read *Dillingham* to protect the right to stay enforcement of judgments pending appeal. Furthermore, *Pullman* abstention may not be predicated on the possibility that a state court could interpret the broad language of the state constitution to overrule a state statute or rule. *Hawaii Housing Authority, supra*, 105 S. Ct. at 2327 n.4; *Examining Board v. Flores de Otero*, 426 U.S. 572, 598 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 438-39 (1971).

abstain. *Younger* counsels "federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Authority*, 104 S. Ct. at 2327-28. For *Younger* to apply three conditions must be present: (1) "important", "substantial" or "vital" state interests must be at stake, and (2) state procedures must be available to provide an adequate opportunity for the appellant to raise his federal claims in a state court, and (3) that there be an on-going state proceeding. *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *Moore v. Sims*, 442 U.S. 415, 423-25 (1979). Since the third condition is clearly met in the present case, we need not discuss it.

With respect to the first of these essential elements of *Younger* abstention, Pennzoil asserts that two substantial Texas interests are at stake in this case: Texas' interest in protecting the rights of its citizens to obtain and enforce judgments in the Texas courts and Texas' interest in the constitutionality of its statutes. Every state, however, has similar interests in every state proceeding. Accepting Pennzoil's argument that these interests are sufficient to mandate abstention would broaden *Younger* to cover almost every § 1983 case and thus undermine the Supreme Court's holding in *Mitchum, supra*, that federal courts are empowered by § 1983 to enjoin ongoing state proceedings. Not surprisingly, *Younger* and its progeny call for no such expansion. Pennzoil's contention would also render meaningless and unnecessary the exercise, regularly engaged in by federal courts called upon to abstain, of analyzing the state interests and remedies involved to determine whether *Younger* abstention is

mandated. *See, e.g., Traughber v. Beauchane*, 760 F.2d 673, 680-81 (6th Cir. 1985); *Miofsky v. Superior Court of State of Cal.*, 703 F.2d 332, 336-38 (9th Cir. 1983).

The state interests at stake in this proceeding differ in both kind and degree from those present in the six cases in which the Supreme Court held that *Younger* applied.[13] In each of those cases the state government or a state official was a party to the action which the federal court was being asked to enjoin and had a direct stake in the outcome since the state action was taken for the purpose of vindicating a particular state policy or remedying an infraction of state law. *See Middlesex Ethics Comm., supra* (federal court should abstain from enjoining agency of state Supreme Court from bringing state disciplinary proceeding against lawyer); *Moore, supra* (federal court should abstain from enjoining state action by state Department of Human Resources seeking emergency order under state Family Code to protect children from parental abuse); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (federal court should abstain from enjoining state court proceeding by state Department of Public Assistance to recover welfare money paid the defendants when they misrepresented their worth in applying for aid); *Juidice v. Vail*, 430 U.S. 327 (1977) (federal court should abstain from enjoining state court judges from enforcing order punishing appellant by jailing him for contempt); *Huffman, supra* (federal court should abstain from enjoining sheriff and county prosecutor from enforcing state civil

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13 *Middlesex Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *Moore v. Sims*, 442 U.S. 415 (1979); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Younger v. Harris*, 402 U.S. 37 (1971).

nuisance statute); *Younger, supra*, (federal court should abstain from enjoining state criminal proceeding). The present case is dramatically different. Here the state has no interest in the underlying action. It is a suit between two private parties stemming from the defendant's alleged tortious interference with the plaintiff's contract with a third private party. An injunction here does not prevent any arm of the state from acting to vindicate a state policy or to punish an infraction of state rules.

Pennzoil argues that the court's holding in *Juidice v. Vail, supra*, to the effect that a federal court must abstain from enjoining a state judge from enforcing a contempt order demonstrates that the state has a substantial interest in the process by which it "protects the rights adjudicated in . . . [its] courts, and enables prevailing parties to satisfy. . . judgments." *Juidice*, however, cannot be read so broadly. The Supreme Court there emphasized that its holding turned on the fact that the contempt power was the weapon used directly by the state courts to protect their authority. The contempt power, the court noted, is the means by which the state "vindicates the regular operation of its judicial system. . . . The contempt power lies at the core of the administration of a State's judicial system." *Juidice, supra*, 430 U.S. at 335. "Contempt . . . serves, of course, to vindicate and preserve the private interests of competing litigants, . . . but its purpose is by no means spent upon purely private concerns. It stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory." *Id.* at 336 n.12. In the present case, Texas' limited interest in insuring that the interests of private litigants such as Pennzoil are preserved does not rise to

the level of a state's interest in safeguarding the basic power of its courts through contempt proceedings.

The relatively minor Texas state interest in the present case is further attested to by the fact that we are not called upon to declare the Texas lien and bond provisions to be unconstitutional on their face but only as applied to the unique and extraordinary circumstances of this case, which are unlikely ever to recur because here obtaining a $12 billion bond is impossible. Our exercise of federal jurisdiction under § 1983 does not open any floodgates. On the contrary, ours is a narrow holding limited to the unusual circumstances of this case. The Texas lien and bond provisions will in most other circumstances continue to be respected and enforced as written by the Texas legislature and the Texas Supreme Court. Thus our decision does not prevent the state from enforcing the policy behind the Texas lien and bond provisions, which is to insure that a judgment creditor's interest in a judgment will be protected during the pendency of an appeal. *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. Civ. App. 1983); *Mudd v. Mudd*, 665 S.W.2d 128, 130 (Tex. Civ. App. 1983); *Cooper v. Bowser*, 583 S.W.2d 805, 807 (Tex. Civ. App. 1979). The unconstitutionality of those provisions as applied in the *Pennzoil-Texaco* case does not nullify them with respect to judgments in other cases.

Nor has Pennzoil satisfied the second requirement for *Younger* abstention, that Texas state courts provide adequate procedures for adjudication of Texaco's federal claims. If resolution of those claims is to be effective, prompt judicial action is essential; time is of the essence. It appears unlikely that Texaco could have been assured of a decision from the Texas trial court on the constitutional issues, at least without the cooperation of Penn-

zoil, before that court lost its jurisdiction over the case in March 1986. Texaco's effort to discuss modification of Par. 7 in December 1985 was rebuffed. The motion before the Texas trial court for a new trial is still pending. In view of the plain language of the Texas bond provision and the consistent line of Texas decisions enforcing it as written, the Texas trial judge would in all probability deny relief sought on constitutional grounds or leave the constitutional issues undecided until his jurisdiction expired.

Apparently recognizing the futility of Texaco's seeking to obtain a timely decision of its constitutional claims through the trial court and traditional appellate channels, Pennzoil urges that an application by Texaco to the Texas Supreme Court for a writ of mandamus ordering the trial court not to apply Rule 364(b) as written would satisfy the *Younger* requirements. We disagree. In the first place, the remedy of state court mandamus, which undoubtedly has been available in many cases denying *Younger* abstention, has never been regarded as an adequate state remedy for abstention purposes, in view of its status as an "extraordinary" writ to be granted only in exceptional circumstances. *Traughber, supra*, 760 F.2d at 684; *Holmes v. New York City Housing Authority*, 398 F.2d 262, 267 n.7 (2d Cir. 1968). Indeed, in *Hernandez v. Finley*, 471 F. Supp. 516 (N.D. Ill. 1978), *summarily aff'd mem. sub nom. Quern v. Hernandez*, 440 U.S. 951 (1979) (deciding *Trainor v. Hernandez, supra*, on remand), the Supreme Court affirmed the district court's finding that the remedies offered by the State of Illinois failed to "afford a plain, speedy, efficient and certain remedy for review of their federal claim", because they left review of a rejected federal claim to the discretion of the state's appellate

courts. *Hernandez*, *supra*, 471 F. Supp. at 520. Neither the district court nor the Supreme Court suggested that the availability to the private litigant of an original action for relief in the Illinois Supreme Court (similar to mandamus), *Illinois Supreme Court Rules* 381-83, constituted an "adequate state remedy". Each time the Supreme Court has found that adequate state remedies existed for *Younger* purposes, the Court's conclusion has rested on the fact that the party seeking § 1983 relief could with certainty obtain a resolution of constitutional claims from the state courts. *See*, *e.g.*, *Middlesex Ethics*, *supra*, 457 U.S. at 435-36; *Juidice*, *supra*, 430 U.S. at 337; *Moore*, *supra*, 442 U.S. at 423-27; *Huffman*, *supra*, 420 U.S. at 608.

Furthermore, we do not believe that mandamus, if granted, would provide Texaco an adequate and timely remedy. Under Texas law, mandamus "will not lie where no request or demand has been made for the performance of such act or where there has been no refusal to perform." *Dozier v. Wray*, 222 S.W.2d 178, 179 (Tex. Civ. App. 1949). *See also Kissam v. Williamson*, 545 S.W.2d 265, 267 (Tex. Civ. App. 1976); *Ratcliff v. Dickson*, 495 S.W.2d 35, 36 (Tex. Civ. App. 1973); *Cozby v. Clifton*, 265 S.W.2d 197, 198 (Tex. Civ. App. 1954). Texaco would be required, accordingly, to expend precious time in requesting the trial court to disregard Rule 364, which as noted, that court would probably fail to do, before seeking mandamus relief. Furthermore, even if the Texas Supreme Court issued the writ, Texaco's problems would not be at an end. There is no assurance that the Texas appellate court would grant an immediate stay of execution pending its decision on the constitutionality of the Texas lien and bond provisions or fix security in a

reasonable amount. Indeed, the Texas appellate court issuing a writ of mandamus "*will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.*" *Pope v. Ferguson*, 445 S.W.2d 950, 953 (Tex. 1969) (quoting *Ex parte Newman*, 81 U.S. 152, 165-66 (1871)) (emphasis in original). Rather, the Texas Supreme Court will remand the case to the trial court with instructions to obey the law as the Texas Supreme Court interprets it. *Pope*, *supra*, 445 S.W.2d at 953. In the present case, that rule would require the Texas Supreme Court to leave it to the Texas trial court to hold the necessary hearings and fix the proper amount of the supersedeas bond. An effort by Texaco to obtain more timely relief from a Justice of the United States Supreme Court under § 1257 would not succeed since the Supreme Court would not grant a stay until the Texas Supreme Court had acted. *See National Socialist Party v. Skokie*, 432 U.S. 43 (1977); *Nebraska Press Assn. v. Stuart, Judge*, 423 U.S. 1327, 1329-30 (1975) (Blackmun, J., in chambers). In the meantime, Par. 7 of the Texas judgment having long since expired, Pennzoil would have executed its $11.12 billion judgment, forcing Texaco down the path of no return.

The Merits: Requirements for Preliminary Injunctive Relief

There remains the question of whether, in light of the foregoing principles, the district court abused its discretion in granting relief. An abuse of discretion would exist if the court relied on clearly erroneous findings of fact or erroneous legal principles in issuing the injunction. *Han-*

son Trust PLC v. SCM Corp., 774 F.2d 47, 54 (2d Cir. 1985).

In this circuit the standard for issuance of preliminary injunctive relief is well-settled. The plaintiff has the burden of showing irreparable harm *and* (1) either probable success on the merits *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *plus* a balance of hardships tipping decidedly in the plaintiff's favor. *Kaplan v. Board of Education of the City School District of the City of New York*, 759 F.2d 256, 259 (2d Cir. 1985); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). The effect of the grant or withholding of such relief upon the public interest must also be considered. *Virginian Railway Co. v. System Federation*, 300 U.S. 515, 552 (1937); *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir. 1974).

Irreparable Harm

It is beyond dispute that, absent injunctive relief, enforcement of Texas' lien and supersedeas bond provisions would rapidly produce a catastrophe of major proportions, causing substantial harm to Texaco itself and to thousands of others throughout the United States, including stockholders, customers, and suppliers. Pennzoil concedes that Texaco, although it has a liquidation value of $22 billion and a net worth of about $23 billion, could not possibly post a bond or security in the sum of the approximately $12 billion that is mandated by Tex. R. Civ. P. 364(b). The simultaneous attachment of a lien pursuant to Tex. Prop. Code Ann. §§ 52.001 *et seq.* on Texaco's real property in Texas, valued at $5 billion, would seal the company's fate. Unable to finance its

operations or obtain credit lines needed for its continued existence, Texaco, the fifth largest business organization in the United States, would be forced into bankruptcy or liquidation. A large percentage of its 55,000 employees world-wide, with an annual payroll of $1.6 billion, would lose their jobs. Approximately 319,000 Texaco stockholders, who received $730 million in dividends in 1985, would suffer heavy losses.

Some idea of the proportions of the threatened catastrophe can be gathered from the undisputed financial crisis that occurred during the week following entry of the Texas judgment. Despite the temporary "stand-still" provisions of Par. 7 of that judgment Texaco's bonds were downgraded by Moody's from investment grade to non-investment grade. It was forced to withdraw from the commercial paper market. Banks with which it did business advised that they would no longer lend it money on unsecured terms because of uncertainties as to what would happen when Par. 7 expired in March 1986. Similarly, because of these uncertainties, potential joint venturers with Texaco cancelled negotiations with it, suppliers refused to do business with it on regular customary terms, and companies refused to negotiate deals for the purchase of Texaco assets. The extent of the harm threatened by enforcement of the Texas judgment is further attested to by some 58 interested parties including 12 states, that have filed amicus briefs or other papers urging that enforcement be enjoined.

In determining whether a threatened injury pending appeal is irreparable it becomes important not only to assess its nature and anticipated duration but whether the plaintiff can be restored to the *status quo ante* if the appeal should result in a reversal in his favor. The

irreparability of the harm increases in proportion to its irreversibility. In most cases, if the judgment is reversed upon appeal, the attachment will be vacated and the property or the proceeds from its sale will be restored to the appellant. His sole harm will have been the deprivation of the use of the property or its monetary equivalent pending the appellate decision. But when, as in the present case, the interim injury is the irrevocable destruction of his business, resulting in bankruptcy or liquidation, a reversal will not undo the injury, which cannot be measured in damages and would in no event be recoverable. The evidence is equally persuasive that without injunctive relief the public interest would be adversely affected. *Virginia Ry. Co. v. System Federation*, *supra*, 300 U.S. at 552.

We are not called upon to review the merits of the Texas action. Indeed, it was not within the district court's province to do so. Under *Rooker* that is exclusively the province of the Texas courts. We must accept for present purposes that Pennzoil has established to the satisfaction of a Texas jury and judge that it was unlawfully injured by Texaco's tortious conduct, that as a result Pennzoil suffered enormous damages, and that Texaco's conduct was sufficiently egregious to require it in addition to pay punitive damages to the victim. However, only if Texaco's appeal were patently frivolous would we be justified in holding that any threatened harm to it from effective denial of its right of appeal could be labelled inconsequential. The issue before us, therefore, is not whether Texaco should have prevailed on the merits in the Texas action but whether its Texas appeal presents non-frivolous issues for resolution.

That Texaco has raised non-frivolous issues as the basis for its Texas appeal is clear. It argues (1) that the Texas trial court erred in not granting it a mistrial based on the acceptance by Texas Judge Anthony J. P. Farris, who presided over most of the 4-1/2-month trial until illness forced him to step down, of a $10,000 "campaign contribution" from Joseph D. Jamail, Esq., Pennzoil's lead trial counsel, while the case was pending before Judge Farris and without disclosure to Texaco; (2) that the successor Texas trial judge (Judge Casseb) refused to read the transcript of the testimony and proceedings that had occurred before Judge Farris and misapplied New York law (which the parties admit governed the case) with respect to (a) the essential elements of a claim of tortious interference with a contract, (b) when a punitive damages award is permissible, and (c) when a contract becomes legally enforceable; (3) that any contract between Getty and Pennzoil was void and unenforceable because it violated S.E.C. Rule 10b-13, the federal antitrust laws, state laws governing fiduciary duties of directors and controlling stockholders, and the Statute of Frauds, and was procured as the result of fraud or mutual mistake; (4) that an improper method was used to compute the award of $7.53 billion compensatory damages; and (5) that Texaco was entitled to judgment as a matter of law because the Texas judgment in Pennzoil's favor violated the Commerce, Supremacy, Full Faith and Credit, Due Process, and Equal Protection Clauses of the United States Constitution.

Fair Grounds for Litigation and Favorable Balance of Hardships

Having shown that without injunctive relief it would suffer irreparable injury, Texaco also had the burden of

demonstrating that it has a substantial chance of success on the merits of the present action (as distinguished from the merits of its Texas appeal) or at least that it has raised fair grounds for litigation and that the balance of hardships tips in its favor. *Kaplan, supra*, 759 F.2d at 259. We are satisfied that Texaco's claim that the Texas bond and lien provisions deny it due process presents a fair ground for litigation. Hence it becomes unnecessary to reach its claim that they also violate its equal protection rights.

The Texas constitution grants a right of appeal to all civil and criminal litigants. *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984); *Airco, Inc. v. Tijerina*, 603 S.W.2d 785 (Tex. 1980); *Bay v. Mecom*, 393 S.W.2d 819, 820 (Tex. 1965); *Dillingham v. Putnam*, 14 S.W. 303, 304-05 (Tex. 1890); *Moore v. Wutke*, 145 S.W.2d 224, 226 (Tex. Civ. App. 1940). Federal due process forbids the state from arbitrarily excluding certain parties from exercising that right. *Evitts v. Lucey*, 105 S. Ct. 830, 840 (1985); *Griffin v. Illinois*, 351 U.S. 12, 17-20 (1956). Furthermore, due process requires that, once the state has created a right of appeal, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts, supra*, 105 S. Ct. at 841. *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 & n.5 (1982). A state would deny a defendant such a "fair opportunity" if it reduced the appeal to a "meaningless ritual" by denying him the means effectively to press his appellate arguments, *Douglas v. California*, 372 U.S. 353, 358 (1963) (right to counsel in criminal appeals). *See also Evitts, supra* (right to effective assistance of counsel in criminal appeals). It is equally self-evident that an appeal would be futile if, by the time the appellate court considered his case, the appeal had by application of a

bonding law been robbed of any effectiveness. *Cf. National Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977); *Nebraska Press Assn. v. Stuart*, 423 U.S. 1319, 1324-25 (1975) (Blackmun, J., in chambers); *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers); *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers).

Thus an inflexible requirement for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted can in some circumstances be irrational, unnecessary, and self-defeating, amounting to a confiscation of the judgment debtor's property without due process. A serious question presenting fair grounds for litigation is therefore raised by Texaco's claim that enforcement of Texas' lien and bond requirements would reduce its appeal to a meaningless ritual. Since Texaco would be bankrupt or in liquidation by the time its appeals were decided the hardship to it would be immeasurable, irrevocable, and irremediable by reversal of the judgment on the merits.

Against the hardship to Texaco from denial of a stay the district court was required to balance the threat to Pennzoil's interests caused by granting the stay. A judgment creditor's primary concern when a judgment in his favor is stayed pending appeal is that he be "secure . . . from loss resulting from the stay of execution." *Federal Prescription Serv. v. Am. Pharm. Ass'n*, 636 F.2d 755, 760 (D.C. Cir. 1980). *See also C. Albert Sauter Co. v. Richard S. Sauter, Co.*, 368 F. Supp. 501, 520 (E.D. Pa. 1973). In making that determination we look to general equitable principles. Accordingly, when setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment

debtors. *Federal Prescription Service*, *supra*, 636 F.2d at 760; *Poplar Grove Planting & Refining Co. v. Bache, Halsey, Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979). *United States v. Kurtz*, 528 F. Supp. 1113, 1115 (E.D. Pa. 1981); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, *supra*, 368 F. Supp. at 520; *Trans World Airlines, Inc v. Hughes*, 314 F. Supp. 94 (S.D.N.Y. 1970), *aff'd in relevant part*, 515 F.2d 173 (2d Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). A full supersedeas bond may be required "where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable", whereas no bond or a reduced bond would suffice when the creditor's interest, due to unusual circumstances, would not be unduly endangered. *Federal Prescription Service*, *supra*, 636 F.2d at 760. The court "may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery." *Id.* at 760-61. *See*, *e.g.*, *Trans World Airlines*, *supra* ($75 million bond to secure judgment of $145,448,140); *Sauter*, *supra* ($100,000 bond, stock placed in escrow, and restrictions imposed on financial commitments, to secure judgment of $1.2 million); *cf. International Telemeter v. Hamlin International Corp.*, 754 F.2d 1492, 1495 (9th Cir. 1985) (appellant can be required to secure the judgment in ways other than by a supersedeas bond); *United States v. Kurtz*, 528 F. Supp. 1113, 1115 (E.D. Pa. 1981) (full bond not required if it would be "impossible or impractical" provided appellant proposes a "plan that [would] provide adequate security for the appellee").

In the present case there is no serious dispute that, should Texaco be required to liquidate its substantial

assets, it would be able to pay Pennzoil's judgment in full. Texaco's financial statement shows that, as of December 31, 1984, it had an appraised net worth of $22.622 billion. Indeed, on November 22, 1985, J. Hugh Liedtke, Chairman of Pennzoil's Board, stated that the liquidation value of Texaco was at least $22 billion and that "he did not doubt Texaco's ability to pay the damages." On December 6, 1985, he followed this statement up with the observation that "Texaco has $37 billion in assets," and that, "[a]fter paying off all the debts that they currently owe . . . some 11 billion dollars . . . they still have 26 billion and it's very adequate to cover what they owe us."

Thus Pennzoil's interest in protecting the full amount of its judgment during the appellate process is reasonably secured by the substantial excess of Texaco's net worth over the amount of Pennzoil's judgment. This undisputed evidence indicates that little, if any, security is required to protect Pennzoil's judgment pending appeal and that its pressure to apply the Texas lien and supersedeas bond requirements may, as Texaco charges, be motivated more by Pennzoil's understandable desire to obtain a favorable settlement of the Texas action than by genuine concerns about possible inability to collect if its judgment should be affirmed on appeal.

The hardship to Pennzoil from a grant of injunctive relief is, therefore, heavily outweighed by that which Texaco would suffer from the denial of such relief. Although a grant of injunctive relief deprives Pennzoil for the time being of a $5 billion lien and immediate execution of its judgment under Rule 364, it eventually will, in the event that its judgment is affirmed and the Texas lien and bond provisions are upheld, be in substantially the same position as it was prior to the issuance of

injunctive relief. It could then avail itself of the Texas lien and bond provisions and, if Texaco should be placed in bankruptcy, it would have the same creditor status as it would have had in the immediate bankruptcy that would have occurred in the absence of injunctive relief. There is no evidence that Texaco, a publicly held corporation, would seek to encumber its property other than as would be necessary in the ordinary course of business or that it would transfer any of its assets to defraud Pennzoil. If any such evidence were adduced, Pennzoil would be justified in moving before the district court for a modification of the injunction.

The district judge did not apply the foregoing equitable rules in formulating the terms of the preliminary injunction. Instead he reviewed the Texas trial and judgment on the merits (but without benefit of the trial record), concluding that at most Pennzoil would be entitled to recovery of $800 million to which he added a $200 million allowance for costs, interest and attorney's fees in requiring that security of $1 billion be posted. This procedure was clearly erroneous and impermissible as a matter of law.

Normally we would remand the case to the district court to reconsider the terms of the preliminary injunction in light of this opinion. *Poplar Grove*, *supra*, 600 F.2d at 1191. However, that course does not appear to be necessary. The district judge acted entirely on the basis of affidavits which did not involve credibility issues. The facts relied upon by us in our foregoing analysis are undisputed. Time continues to be of the essence. Moreover, Texaco has now posted the $1 billion security required by the district court even though application of

equitable principles may have justified a bond in a lesser amount.

The preliminary injunction must therefore stand, subject to such applications as may be made by the parties, based on new evidence or a change in circumstances, with respect to the terms of security to be furnished in lieu of or in addition to the $1 billion security already posted. We do not view the terms of the preliminary injunction to be contrary to or inconsistent with those of Par. 7 of the Texas judgment, which remain in force and must be obeyed until they expire. Absent a proffer of additional evidence with respect to the merits of the present federal action, a hearing on the merits would appear to be unnecessary pending final disposition of the appeals of the Texas judgment.

Pennzoil argues, however, that any necessity for preliminary relief is dispelled by its "stipulation" that the Texas trial court may apply the standards of Fed. R. Civ. P. 62 to determine the security required of Texaco pending appeal. Pennzoil's "stipulation" does not solve the problems Texaco faces in this action. It has not been accepted by Judge Casseb or agreed to by Texaco, it does not waive Pennzoil's right to demand a supersedeas bond in the full amount of the judgment, and Pennzoil has reserved its right to seek such a bond. The "stipulation" is simply Pennzoil's unilateral request to the Texas trial court to apply the procedural rule of another jurisdiction. It is doubtful that a Texas state court, whose function is to apply Texas law, would consider itself any more jurisdictionally obligated, much less willing, to obey Pennzoil's request than it would be to apply Chinese or Russian procedural law simply because one party requested it. As noted in the *Restatement (Second), Conflict of Laws*

§ 122 (comment a) (1971), a forum "has compelling reasons" for applying its own procedural rules and "enormous burdens are avoided when a court applies its own rules, rather than the rules of another state, to issues relating to judicial administration, such as . . . mode of trial and execution". *See also Restatement*, *supra* at § 131.

Texas courts have recognized that its rules of procedure are designed to promote procedural uniformity. *Rice v. Thompson*, 239 S.W.2d 137, 139 (Tex. Civ. App. 1951). Accordingly, "[i]t is not optional with trial or appellate courts to disregard [Texas procedural rules] because they do not meet with the approval of such courts." *Pearl Assur. Co. v. Williams*, 167 S.W.2d 808, 810 (Tex. Civ. App. 1942). *See generally*, 1 *R. McDonald, Texas Civil Practice*, § 0.04, at 6-10 (1981) (individual attorneys and the trial court are not free to rework rules of procedure). Furthermore, Texaco's refusal to agree to the stipulation is understandable, in view of the likelihood that a Texas state court accustomed to the Texas lien and bond provisions would interpret Rule 62 as consistently as possible with those provisions rather than exercise the wide discretion used by federal judges in ruling upon such applications. If Pennzoil had offered to accept a bond in a specific amount, our views might be different. *See Yandell v. Tarrant State Bank*, 538 S.W.2d 684, 687 (Tex. Civ. App. 1976); *United Benefit F. Ins. Co. v. Metropolitan Plumbing Co.*, 363 S.W.2d 843, 847 (Tex. Civ. App. 1962); *Zurich General Accident & Liability Ins. Co. v. Fort Worth Laundry Co.*, 63 S.W.2d 236, 237 (Tex. Civ. App. 1933). But its Rule 62 offer does not justify denial of injunctive relief in this action.

CONCLUSION

We conclude that federal jurisdiction exists over Texaco's claims that the mandatory Texas lien and bond provisions are unconstitutional as applied. The district court, moreover, was not required to abstain from exercising that jurisdiction.

We also conclude that the issuance of preliminary injunctive relief and requirement of $1 billion security as a condition thereof did not constitute an abuse of discretion. The district judge, however, clearly erred in assuming jurisdiction over other claims that had been adjudicated by the Texas court and in substituting his views for those of the Texas court and jury as to the application of New York law, the propriety of awarding punitive damages and the amount of compensatory damages that might properly have been awarded. Those issues rest solely within the jurisdiction of the Texas trial and appellate courts, which will give them careful consideration, and eventually with the United States Supreme Court, whose decision will be final.

We hasten to note that our decision rests partly upon the extraordinary circumstances of this case, which are unlikely ever again to recur: a private civil money judgment in an amount unprecedented in the annals of legal history, a clear inability on the part of the judgment debtor to comply with a state law mandating a bond in the full amount of the judgment pending appeal, the prospect that the state appellate court would not rule on the constitutionality of the state law before the judgment creditor acted to enforce the judgment, and the likelihood that immediate enforcement of the Texas lien and bond provisions would lead to irreversible destruction of the

debtor before its appeal could be heard and decided on the merits, thus robbing its right of appeal of any meaning and effect. For these reasons our decision, like that of the Fifth Circuit in *Henry v. First National Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), is obviously a narrow one in its scope and application.

The grant of preliminary injunctive relief, as modified, is affirmed on condition that Texaco promptly and diligently prosecute its appeal in the Texas appellate courts. Our affirmance is without prejudice to the rights of Pennzoil, upon a showing of changed circumstances, to move in the district court for modification of the terms of the preliminary injunction.

We remand the case to the district court with directions to dismiss Texaco's First, Second, Fourth, Fifth and Seventh Claims and to modify its January 16, 1986, order in accordance with this opinion. The district court will retain jurisdiction, pending the final decision of Texaco's appeal on the merits pursuant to 28 U.S.C. § 1257, for the purpose of ruling on any applications with respect to the security terms of the injunction arising out of changed circumstances.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9640-CLB

TEXACO INC.,

Plaintiff,

—against—

PENNZOIL COMPANY,

Defendant.

ORDER—Dated January 16, 1986

Upon all papers and proceedings had herein, including the Findings and Conclusions and Supplemental Findings of Fact made by this Court after a hearing pursuant to Rule 65, F.R.Civ.P. and dated January 10, 1986, it is hereby

1. ORDERED that the motion of plaintiff, Texaco Inc., for a preliminary injunction is hereby granted; and it is further

2. ORDERED that defendant, Pennzoil Company, its employees, agents, attorneys and servants, and all persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are jointly and severally enjoined and restrained, pending the trial and ultimate disposition of this action, or the further order of this Court, from taking any action of any kind whatsoever to enforce or attempt to enforce the Judgment entered in an action in the District Court for the 151st Judicial District of Texas entitled *Pennzoil Company* v. *Texaco Inc.*, including, without limitation, attempting to obtain or file any judgment

lien or abstract of judgment related to said Judgment (pursuant to Tex. Prop. Code Ann. §§ 52.001, *et seq.*, or otherwise), or initiating or commencing steps to execute on said Judgment; and it is further

3. ORDERED that within 20 days following entry of this Order, plaintiff shall propose and submit to the Court security in the total amount of $1,000,000,000 (One Billion Dollars), including the sum of $1,000,000 (One Million Dollars) heretofore posted to secure the Temporary Restraining Order, which security shall be in a form satisfactory to the Court after having heard counsel for defendant Pennzoil Company on that subject; and it is further

4. ORDERED that a hearing concerning the appropriateness of any such security tendered by plaintiff Texaco Inc. may be heard on 24 hours' notice by application to the Deputy Clerk of this Court for an hour or date on which the Court will be available; and it is further

5. ORDERED that the motion of defendant Pennzoil Company to dissolve the Temporary Restraining Order issued by this Court on December 17, 1985, and extended by consent of the parties by order dated December 23, 1985, and to dismiss plaintiff's amended complaint for failure to state a claim upon which relief can be granted and for want of subject matter jurisdiction, is hereby denied; and it is further

6. ORDERED that the status conference required pursuant to Rule 16, F.R.Civ.P. shall be held by this Court on April 7, 1986 in Courtroom 31 at the United States Courthouse, 101 East Post Road, White Plains, New York 10601.

Dated: White Plains, New York
January 16, 1986

/s/ CHARLES L. BRIEANT

Charles L. Brieant
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9640-CLB

TEXACO, INC.,

Plaintiff,

—against—

PENNZOIL COMPANY,

Defendant.

ORDER ON REMAND—Dated April 8, 1986

Pursuant to the mandate of the United States Court of Appeals for the Second Circuit, dated February 20, 1986 and filed in this Court on March 14, 1986, and all prior proceedings, it is hereby ORDERED that the Order issued by this Court in this action on January 16, 1986 ("the Order"), be amended as follows:

1. The provisions of paragraph 2 of the Order shall expire upon the effective date of any final judgment in *Pennzoil Company v. Texaco Inc.*, No. 84-05905 (District Court for the 151st Judicial District of Texas), after exhaustion or expiration of all appellate remedies (whether as of right or discretionary, including expiration of the time in which a motion for rehearing or reconsideration may be heard) in the courts of the State of Texas and the United States Supreme Court.

2. A hearing concerning the appropriateness, in accord with the decision of the Court of Appeals, of the security previously posted herein by plaintiff Texaco, Inc. may be held on 24

hours' notice, or such shorter time as the Court may allow, by application to the Deputy Clerk of this Court for an hour or date on which the Court will be available.

3. The first, second, fourth, fifth and seventh claims in plaintiff Texaco Inc.'s amended complaint are hereby dismissed for want of subject matter jurisdiction.

4. The making of a scheduling order in this action pursuant to Rule 16(b), Fed. R. Civ. P. is deferred indefinitely, subject to reconsideration upon the application to this Court of any party by notice of motion or on the Court's own motion.

5. No pre-trial discovery shall be taken in this action without the prior leave of the Court.

So Ordered.

Dated: White Plains, New York
April 8, 1986

/s/ CHARLES L. BRIEANT

Charles L. Brieant
U. S. D. J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9640-CLB

TEXACO, INC.,

Plaintiff,

—v.—

PENNZOIL COMPANY,

Defendant.

OPINION—Dated January 10, 1986

Findings and Conclusions

BRIEANT, *District Judge.*

By a motion, pursuant to an Order to Show Cause, issued by this Court on December 17, 1985 and heard on January 9, 1986, plaintiff ("Texaco") seeks a provisional remedy in the nature of a preliminary injunction pending trial of the issues raised in its amended complaint, as follows: That defendant ("Pennzoil"), its employees, agents, attorneys and servants be jointly and severally enjoined and restrained from taking any action of any kind whatsoever to enforce or attempt to enforce the Judgment entered in an action in the District Court for the 151st Judicial District of Texas entitled *Pennzoil Company v. Texaco Inc.*, (hereinafter "the Judgment") including, without limitation, attempting to obtain or file any judgment, lien or abstract of judgment related to the Judgment (pursuant to Tex.Prop.Code Ann. ¶¶ 52.001, *et seq.*, or otherwise), or

initiating or commencing any steps to execute on the Judgment.

This Court issued a temporary restraining order to this effect on December 17, 1985 and extended it on consent of the parties by an order dated December 23, 1985. Following the hearing, that order remains in effect by oral direction of the Court.

Pennzoil, by a cross motion filed on December 20, 1985, also heard January 9, 1986, seeks to dissolve this Court's temporary restraining order and to dismiss plaintiff's amended complaint for failure to state a claim upon which relief can be granted and for want of subject matter jurisdiction.

Familiarity of the reader with the amended complaint filed December 13, 1985 must be assumed. In sum, Texaco's complaint pleads the following claims:

1. That the Judgment and the legal principles underlying it impermissibly burden interstate commerce by deterring competitive tender offers and therefore violate the Commerce Clause and frustrate the purposes of the Williams Act. (Claims One and Two).

2. That the Judgment conflicts with, and therefore is preempted by, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(d), 78n(e) and 78bb, which promotes and provides a framework for competing tender offers. (Claim Four).

3. That the Judgment fundamentally changes the New York law of tortious inducement of breach of contract, in derogation of fundamental New York policies and in violation of the Full Faith and Credit Clause. (Claim Five).

4. That application of the supersedeas bond and lien provisions of Texas law effectively precludes Texaco from exercising its right to appeal in the Texas courts and, if necessary, to petition for *certiorari* to the United States Supreme Court, all in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. (Claims Three and Six).

5. That the Judgment, as the result of a fundamentally unfair proceeding, violates the Due Process Clause of the Fourteenth Amendment. (Claim Seven).

The Court makes the following findings of fact and conclusions of law after a hearing, and pursuant to Rule 65, F.R.Civ.P.[1]

Jurisdiction

[1] The amended complaint filed in this Court on December 13, 1985 alleges that the enforcement of the Texas state court judgment will infringe rights secured to Texaco by the Commerce, Supremacy and Full Faith and Credit Clauses of the United States Constitution, Articles I, section 8, Article VI, Clause 2, and Article IV, section 1, clause 1, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution and by the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the Securities Exchange Act of 1934, 15 U.S.C. § 78a. As such, this complaint has plainly stated federal claims over which this court has subject matter jurisdiction under 28 U.S.C. §§ 1331(a) and 1343(a)(3). *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946).

Venue is proper in this District under all three grounds of 28 U.S.C. § 1391. The plaintiff has its principal office at White Plains, New York, and defendant does business in the Southern District of New York. The claims arose in this District. Personal jurisdiction over the defendant is satisfied by its presence in this District.

Second Circuit Injunction Standard

On a motion for a preliminary injunction in this Court, it is usually held that "the moving party has the burden of estab-

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1 Both parties waived the taking of sworn oral testimony before the Court and the cross examination of affiants. *See* Transcript of January 9, 1986 at p. 3. No credibility issues are present which are relevant to the issues resolved by this decision.

lishing: (a) irreparable harm; and (b) either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary injunctive relief." *Kaplan v. Board of Education of the City School District of the City of New York*, 759 F.2d 256, 259 (2d Cir.1985) *citing Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam).

The mere fact that this case involves only private parties does not permit our inquiry with regard to irreparable harm to end with consideration only of the interests of Texaco and Pennzoil as parties before the Court. As our Court of Appeals, and the Supreme Court, have explained, "Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Stamicarbon, N.V. v. American Cyanamid Co.*, 506 F.2d 532 (2d Cir.1974), *quoting Virginian Railway Co. v. System Federation*, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789 (1937).[2]

Irreparable Harm

[2] Texaco is a very large corporation. It is said to be the fifth largest company in the United States and the third largest oil company. As such it has well established patterns of doing business, which have created a dependency upon it by not only a large number of employees throughout the nation, but also an even greater number of dealers and customers for its products and services, and suppliers. As the numerous letters from Congressmen and Senators docketed in this action and

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2 The public interest in this proceeding is considerable. This Court has received a significant number of letters in the nature of *amicus curiae*. Among these eighteen letters, mostly from Senators and Congressmen, sixteen of them have directed this Court's attention to the economic importance of Texaco in various regions of the country. Four states (Wyoming, Oklahoma, Kansas and Florida) submitted formal *amicus curiae* briefs.

amicus curiae briefs from several states indicate, Texaco's death or insolvency would have a severe impact upon many people and regions throughout the country. In California, for example, Texaco employs over 4000 people (with aggregate annual salaries and wages in excess of $140 million) and conducts business with 16,000 suppliers. *See* letter of Rep. Glenn Anderson, M.C., dated Dec. 18, 1985. In Florida, Texaco pays approximately $6.7 million annually in state royalties and taxes. Brief of State of Florida, *amicus curiae*, at 2. Texaco contracts with over 4000 vendors in Louisiana and, during 1985, it expended over $1.4 billion in that state. *See* Letter of Louisiana Congressional delegation, dated December 16, 1985. Texaco employs about 55,000 people worldwide with a total payroll of $1.6 billion. In 1985 Texaco paid over $730 million in dividends to 319,000 shareholders. Affidavit of R. G. Brinkman, ¶ 3, (Dec. 17, 1985).

The sudden death or dismemberment of a corporation, while it is not analogous to the sudden death of an individual, hurts the public interest. This corporation should not be squeezed through the bankruptcy court or stopped in its tracks through a levy of execution or sale of its various assets under judgment or have its normal access to credit cut off, at least until appellate finality has attached to the Judgment. Unless enforcement of the Judgment is stayed by this Court, Texaco will confront these evils. The consequent harm to Texaco will be shared by those members of the public whose welfare is dependent upon Texaco's continued existence as a vital wealth-generating economic organism. As the multitude of affidavits submitted by Texaco make clear, Texaco has found it increasingly difficult to obtain the financing necessary to conduct its ordinary business operations. *See, e.g.*, Affidavits of Mr. R. G. Brinkman, dated December 17, 1985, December 19, 1985, and January 8, 1986.

The judgment with its present interest and costs amounts to $11.12 Billion. As measured by the stock market, which is rarely far wrong in such matters, the entire going concern or net worth of Texaco before the Judgment, was valued at

approximately $9.5 Billion. Various Pennzoil representatives have stated that this understates the true value of Texaco's assets. They assert that the actual value lies in the $23 to $37 Billion range. *See* Affidavit of Francis P. Barron, Esq. Exhibits 1 and 2. Even if these estimates are correct, there is no way in the world that Texaco could pay the Judgment without reorganizing or liquidating. This could only be accomplished pursuant to a consent plan or under a bankruptcy court's auspices because other creditors also have claims on Texaco's assets. Such relief does not provide an adequate remedy for Texaco. As the Supreme Court has found, the threat of bankruptcy adumbrates the irreparable harm necessary for the granting of a preliminary injunction. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932, 95 S.Ct. 2561, 2568, 45 L.Ed.2d 648 (1975). Texaco would emerge as a fundamentally different company if it were obliged to reorganize pursuant to Chapter 11 of the Bankruptcy Code. This would be true even if the Pennzoil Judgment were later set aside.

Imposition of an injunction admittedly presents some risk of harm to Pennzoil's position. The risk of such harm, however, is slight. Indeed, Pennzoil's successful insistence upon the bond requirement might drive Texaco into Chapter 11 proceedings and leave Pennzoil with a Pyrrhic victory. A number of corporations, both large and small, have recently found that Congress has created a rather pleasant and profitable harbor of refuge in the bankruptcy court, where they may gain time and other special considerations in dealing with litigation. However, as we have explained, the availability of Chapter 11 is not an adequate remedy at law for Texaco in this case, so as to preclude injunctive relief, and bankruptcy of Texaco would have a most adverse effect on the public interest.

The imminent disruption to the national economy and to the interests of the public, supports a finding of irreparable harm, at least while the Texas judgment remains subject to appellate review. I include in the public Texaco's customers, suppliers, employees and others who would suffer from the sudden disruption in Texaco's day to day activities.

It should go without very much elaboration that Texaco itself would be irreparably damaged, and I so find. Immediate enforcement of the Judgment will further limit Texaco's ability to compete in the marketplace and to maintain its current level of business. Accordingly, I find and conclude that irreparable harm to the Public and to Texaco will occur if the Judgment is enforced in any way and to any extent prior to achieving appellate finality.

Likelihood of Success

This Court finds and concludes that a direct appeal from the Judgment would certainly be non-frivolous. The Court also finds that Texaco as an appellant has a substantial likelihood of success on a number of its non-federal points for appellate review in Texas or on a petition for *certiorari* to the Supreme Court of the United States.

This Court should not be regarded as attempting to sit as a final or intermediate appellate state court as to the merits of the Texas action. *Cf. Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). Our only intention is to assure Texaco its constitutional right to raise claims that we view as having a good chance of success.[3] The Court bases its analysis on New York law, which the parties concede is appli-

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3 In reaching this conclusion, the Court places no reliance on the allegations of judicial impropriety in Texas, except to observe that Texaco should have the right to seek review of these contentions, along with its other more persuasive appellate points, without first being dismembered. Most judges are honest and sincere, and all should be presumed to be such. Those few who are not, do not throw a case for campaign contributions publicly recorded and probably long since spent. Instead, they live in a C.O.D. world where clandestine payments are made to a bagman. *United States v. Manton*, 107 F.2d 834, 840 (2d Cir.1939). That some judicial goodwill eventuated to the contributing lawyer we may assume. Goodwill means perhaps his brief will be accepted a day late, a golfing continuance may be granted, and his jokes may evoke more judicial laughter than they otherwise deserve. But it is impossible for a lawyer to rub his own goodwill off onto the client, or the merits of the client's cause.

cable to the claim in the Texas court and with which this court is very familiar.

The Court regards the Texas litigation as relatively simple. The only difficulty it presents is that it is posited in terms of such vast amounts of money that the ordinary principles and practices which affect the bonding of judgments or supersedeas arrangements for judgments are simply not practical.

Texaco has also raised here a number of federal statutory claims, over which the Federal Courts have exclusive jurisdiction. These claims raise serious questions going to the merits of the Judgment and present generally fair grounds for litigation.

Liability

For our present purposes we withhold comment about the contract law issue or the factual issue of knowing and willful tortious interference. This Court assumes, solely for purposes of its analysis of the issues presented on this motion, that Pennzoil properly prevailed on those issues. The Court in Texas which let these liability issues go to the jury and denied Texaco's motions for directed verdict and judgment notwithstanding the verdict is entitled to the benefit of the presumption of regularity and the presumption of correctness on its part. We should bear in mind that the damages in the case were fixed by a trial jury, not by the court itself in Texas. They do not represent the result of fact finding by the trial judge and in any event are still amenable to correction by direct appeal, and by a motion for a new trial, filed in Texas on January 9, 1986 and not yet resolved.

Punitive Damages

The trial jury awarded punitive damages in the amount of $3.0 Billion. The tort of interference with contractual relations is an intentional tort. In order to obtain punitive damages in this context, Pennzoil had to prove that Texaco's conduct was not only intentional but also motivated by "actual malice or ill will." *Anthony v. George T. Bye*, 243 App.Div. 390, 277 N.Y.S. 222 (1935).

While punitive damages have become quite fashionable lately, this case essentially involves a transaction in the commercial area where reasonable persons couid differ as to whether Getty was bound to a contract when Texaco acted. If there was no contract, of course there could be no tortious interference.

The standard for imposition of punitive damages in New York requires that the defendant's tortious activities be aimed at the public generally, as the New York State Court of Appeals explained in *Walker v. Sheldon*, 10 N.Y.2d 401, 405, 223 N.Y.S.2d 488, 179 N.E.2d 497 (1961). Punitive damage awards are also inapplicable where the availability of such an award is not essential to induce a potential plaintiff to go to court to right a wrong that might otherwise go unremedied if the injured party were limited to compensatory damages. *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1080 (2d Cir.1977); *see also Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976). These factors, either of which might justify the award of punitive damages, are not present in this case. Indeed, a substantial portion of the public at large, *viz.*, the public shareholders of Getty, benefited from Texaco's tortious activity, which greatly enhanced the proceeds realized for their investments.

No public policy of the State of New York is served by awarding punitive damages in this type of case, and this Court believes that a reviewing court in Texas will find that quite obvious. Furthermore, an award of punitive damages in this case is highly likely to have a negative impact on the federal policy which seeks to ensure that a company be sold via tender offer at a price that maximizes shareholder welfare. This federal policy is expressed in the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78n(d), 78n(e), and the rules and regulations promulgated thereunder, and is well pleaded in the amended complaint in this case.

Compensatory Damages

Compensatory damages in New York are generally regarded as requiring an award of money which would make an injured

party whole, or, putting it differently, those damages which are based on the benefit of the bargain. Pennzoil does not dispute that its "agreement in principle" provided for its purchase of three-sevenths of the outstanding Getty shares. It had not arranged for the purchase of oil reserves, or any other specific Getty asset. It would have had as much control over Getty's oil assets as it would have had over the cable television networks then partly owned by Getty. In arm's-length negotiations, which the Texas jury found ripened into a firm contract, and this Court assumes for its present purposes that it did in fact so ripen into a binding contract, Pennzoil agreed to pay $112.50 per share for three-sevenths of Getty's outstanding shares, for a total price of $2.6 billion. At that price the market value of Getty's shares was approximately $6.1 billion.

Within a few days, Texaco agreed to purchase all of Getty's shares at $128 per share (an increase of $15.50 per share over the Pennzoil offer). At that price the market value of the outstanding Getty shares amounted to approximately $6.9 billion. The best indication of the value of anything, including the stock of an oil company, is usually an arm's length sale between adequately informed parties, neither under any compulsion to buy or sell; indeed, that is the traditional definition of market value. In this instance, the market value of Getty's outstanding shares was approximately $6.9 Billion.

If this verdict stands, the benefit of the bargain must be assumed by mathematics to be $7.53 billion, and the market value of Getty in excess of $10 billion. Expressed differently, if the verdict is valid, the Getty interests, in their transaction with Pennzoil, agreed to sell stock for $3 billion less than its true value. Expressed in percentage terms, the Getty interests sold the stock for 75 per cent of its value. This is absurd. If the jury's determination is the true value of the transaction, the contract would have been amenable to accusations of unconscionability, or overreaching, or perhaps even fraud in the inducement, not to mention the run-of-the-mill accusations of breach of fiduciary duty so often levelled against directors and trustees.

This Court therefore believes that the compensatory damages which flow from this breach of contract, tortiously induced by Texaco, should in no event exceed $800 Million, the approximate difference between the price per share offered by Pennzoil and the price offered by Texaco for all Getty's outstanding shares. That figure assumes that Pennzoil's bargain included the ultimate opportunity to purchase or otherwise control all the Getty shares.[4]

Pennzoil also had a duty under New York law to mitigate its damages. In the interests of brevity, and for lack of information, we do not touch on this issue, which could only serve to reduce Pennzoil's damages. The foregoing computations are presented only to demonstrate that the compensatory damages determined by the jury are too large by several orders of magnitude.

This Court accordingly finds that Texaco has a worthwhile appeal in the Texas courts, and that it is highly likely to succeed in reducing the damages to a considerable extent.[5]

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4 Pennzoil's agreement in principle as announced in January 4, 1986 press releases, provided that Pennzoil would purchase a total of three-sevenths of Getty's shares and that Mr. Gordon P. Getty, as Trustee of the Sarah C. Getty Trust, would acquire the Getty shares held by the J. Paul Getty Museum. The arrangement would have left Pennzoil and the Getty Trust as the sole owners of Getty shares. The agreement in principle also provided that Getty would grant to Pennzoil an option to purchase up to 8 million treasury shares of Getty at a price of $110 per share. Also, Mr. Getty and Pennzoil agreed to maintain their proportionate shares of the company. It is highly likely that if Texaco had not acted to purchase all of Getty's shares, Pennzoil might have had to purchase, at some future time, the outstanding shares from the Getty Trust in order to effect total control over the company. Pennzoil was the logical purchaser if the Getty Trust determined to divest its shares at some future time. Accordingly, for our purposes we treat Pennzoil as having a strong likelihood of total ownership and control, although this may not be entirely accurate.

5 Texaco offered no proof of Pennzoil's damages. We do not understand this to be a waiver of the rule of law by which such damages are to be determined, even if Pennzoil's three experts testified to boxcar numbers.

Constitutional Claims

The State of Texas is not required by the United States Constitution to give a right of appeal at all. The Texas State Courts, however, have interpreted that state's Constitution, particularly Article I, §§ 13, 19, as recognizing such a right. *Stroud v. Ward*, 36 S.W.2d 590, 591 (Tex. Civ.App. 1931) ("A dissatisfied litigant has the constitutional right to have his case reviewed by the Court of Civil Appeals").

Having once determined to grant such a valuable right, the now well-established Fourteenth Amendment jurisprudence prevents the State from conditioning the effective exercise of that right on excessively restrictive conditions. The Supreme Court has reiterated on several occasions that, "[t]he fundamental requisite of due process is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). *See Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); *see also Boddie v. Connecticut*, 401 U.S. 371, 379-380, 91 S.Ct. 780, 786-87, 28 L.Ed.2d 113 (1971). Although the states are not required to establish avenues of appellate review, "it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Williams v. Oklahoma City*, 395 U.S. 458, 459, 89 S.Ct. 1818, 1819, 23 L.Ed.2d 440 (1969) (per curiam), quoting *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

Pennzoil has cited dicta in *Lindsey v. Normet*, 405 U.S. 56, 77-79, 92 S.Ct. 862, 876-77, 31 L.Ed.2d 36 (1972), to support its claim that the Texas supersedeas bond provision is constitutional as applied to Texaco in this instance. In *Lindsey*, the Court considered a challenge to Oregon's double bond requirement for appeal in forcible entry and detainer actions. Although the Court agreed with the petitioners' claim that the double bond requirement violated the equal protection clause of the Fourteenth Amendment, it added in passing that other "reasonable procedural provisions to safeguard litigated property or to discourage patently insubstantial appeals" would not

necessarily violate the equal protection clause of the Fourteenth Amendment. *Id.* at 78, 92 S.Ct. at 876 (Citations omitted). As described above, however, the challenged Texas supersedeas bond provision combined with the immediate enforcement of the Judgment would effectively bar Texaco's meritorious appeal.

While Texaco's appeal can be heard on the merits, this Court finds that there is no discretion in the Texas court to grant a stay of execution pending a meritorious appeal without posting a bond (or equivalent security) in the full amount, plus two years' interest at ten per cent, plus the anticipated costs of appeal, unless Pennzoil consents. Tex.R.Civ.P. Rule 364(a), (b). In this instance, the supersedeas bond would amount to more than $12 Billion Dollars, and in addition the Judgment will be a lien on Texaco's assets wherever filed, even if bonded.

The concept of posting a bond of more than $12 Billion is just so absurd, so impractical and so expensive that it hardly bears discussion. Texaco's right to appeal the Judgment to the Texas Court of Civil Appeals and, ultimately, to the United States Supreme Court, (provided by 28 U.S.C. § 1257) without a stay of its enforcement, would be meaningless. An $11 Billion Dollar lien on Texaco's assets would paralyze that company long before the Texas litigation reaches the point where the United States Supreme Court may decide whether to grant a Texaco petition for *certiorari*, should such relief prove necessary.

The Supreme Court directed us in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976) to assess the adequacy of state procedures that restrict an individual's property rights according to the following three factors: First, the nature of the private and state interests involved; second, the risk associated with erroneous deprivation of the right; and third, the extent of the administrative burden imposed upon the state by the required procedural safeguards.

In this case each of these three considerations cuts in favor of Texaco's right to a stay in order to appeal the state court verdict. The private interest and the state interests converge in

this instance. Texaco's obvious interest lies in its desire to remain in business while challenging the trial outcome. The state's interest in respect for its judgments and its legal process is furthered by ensuring Texaco's right to appeal.

As explained earlier, the risk of erroneous deprivation is quite severe in this instance. We have already outlined the irreparable nature of the injuries that Texaco would suffer if it is not granted relief from the challenged Texas state procedures. *See* pages [A59-A62] *supra*.

The administrative burden on the State of Texas will be slight. In order to assure Texaco of its right to enjoy a non-illusory appeal of the jury verdict, it need only provide access to its Court of Civil Appeals, as it would do normally. The only difference lies in the fact that Texaco may appeal the Judgment without posting the full $12 Billion bond and without fear that Pennzoil will immediately enforce the Judgment.

Obviously recognizing the force of this argument, Pennzoil, on December 20, 1985, submitted a "stipulation" to the Texas court, a copy of which was filed as document No. 14 in this action on the same date. This document, on its face simplicity itself, is not a stipulation in the sense commonly referred to; that is to say Texaco has not agreed to it, nor has the Texas court indicated its approval. It is a unilateral paper which reads in relevant part as follows:

> "Pennzoil Company, plaintiff in this action, hereby presents the Court the following stipulation concerning the judgment the Court entered in this action on December 10, 1985:
>
> 'Pennzoil stipulates and agrees that, if Texaco seeks to supersede or stay the enforcement of this judgment and it makes provisions to secure the judgment which the Texas courts determine would meet the standards of Fed.R.Civ.P. 62, Pennzoil will be bound by any stay that the Texas courts enter based on a finding that Texaco has

provided security which meets the standards of Fed.R.Civ.P. 62.'

WHEREFORE, Pennzoil requests that the Court accept this stipulation."

The filing of this so-called "stipulation" is not available to Pennzoil to defeat the Sixth Claim pleaded in Texaco's amended complaint. The Court finds no basis in our jurisprudence by which Texaco is required to accept this belated concession, nor is it established here that the Texas court must accept such a unilateral grant of power. It is abundantly clear on the record before me that the Texas court recognizes it has no power to give a stay pending appeal, except upon full compliance with Rule 364. This Court doubts very much that such a unilateral stipulation can give a court power to hear and decide an issue which it would not ordinarily have the power to hear and decide. I find, accordingly, that without injunctive relief from this Court Texaco will not be able to obtain a stay pending appeal without delay unless it provides security in the full amount.

Vivid evidence of this fact was demonstrated at our hearing, where it appeared that the trial judge in Texas, in order to obtain Pennzoil's "consent" to an extremely limited "standstill agreement," (see Judgment, ¶ 7, Ex. 1 to Amended Complaint) found it necessary to inform Pennzoil's counsel directly that if Pennzoil did not "consent" thereto, the court would exercise its so-called "broad discretion" to grant a new trial. It seems unlikely that a judge would find necessary such a forceful approach if, as Pennzoil now argues to this Court, there is ample basis for Texaco to get a stay equivalent to the injunctive relief it seeks from this Court by direct application to the trial judge in Texas. We need not infer that experienced participants would behave in such a bizarre fashion, as they apparently did in connection with the standstill agreement, if the judge believed he had the discretion to act pursuant to the standards of

Rule 62, F.R. Civ.P., or believed that such authority could be granted to him by unilateral stipulation.

Accordingly, the Court believes that on the sixth claim pleaded in Texaco's amended complaint here, which is based on the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, plaintiff has a very clear probability of success.

Federal Statutory Claims

Insofar as the other claims pleaded are concerned, extended discussion at this time seems unnecessary. At the very least the Court finds that each one presents fair ground for litigation. As we noted earlier, if this judgment were enforced suddenly against Texaco, prior to having attained appellate finality, Texaco would be irreparably damaged, resulting in dismemberment and death of this economic enterprise. Accordingly, the balance of hardships on this point tips decidedly in favor of Texaco.

In litigating these federal issues in this Court, we note that Texaco would not be bound by any principles of *res judicata* or issue or claim preclusion as a result of the judgment in Texas. In a recent series of decisions in this area, the Supreme Court has clarified the application of res judicata principles in federal courts. In *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), the Court explained that a prior state court judgment should have the same claim preclusive effect in any federal court as it would in another court of that state. The Court based its decision on its interpretation of the Full Faith and Credit Clause of the Constitution as implemented by 28 U.S.C. § 1738. This general rule, however, is limited by the Court's later decision in *Marrese v. American Academy of Orthopaedic Surgeons*, ____ U.S. ____ 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985). In that case, the Court held that, although the Full Faith and Credit Statute requires the federal courts to examine the preclusive effect of state judgments according to that state's claim preclusion principles, that determination was only

a first step of the analysis. By way of fairly clear dictum, the Court stated that in some instances, a grant of exclusive jurisdiction to the federal courts for the protection of a particular statutory scheme may represent Congressional intent to repeal § 1738 for the purposes of that statutory scheme. The federal security law claims raised in this amended complaint may very well present an appropriate situation for an exception to § 1738 contemplated in *Marrese*.

The Judgment in Texas came out of a state tort action, arising under New York common law. It should not have any preclusive effect in litigating the federal security law claims pleaded here which are set forth in Claim Numbers Two and Four, in this complaint, because those claims arise under statutes as to which this Court has exclusive subject matter jurisdiction. 15 U.S.C. § 78aa.

Therefore, even with the assumption that the State of Texas applies the same claim preclusion principles that New York applies (which are about as broad as can be imagined because they include everything that was pleaded or could have been pleaded), this Court finds and concludes that federal claim preclusion as most recently outlined by the Supreme Court in *Marrese* would not extend to bar the federal question claims pleaded in Claims Two and Four of the Amended Complaint.

Any provisional remedy granted by this Court is granted for the day and conditions presently before the Court, and it is not required that this Court activate its crystal ball or predict in advance how long it will take to resolve the Texas appellate proceedings, or what the final outcome will be. However, even if the Judgment ripened into a final judgment in this vast amount of money, and assuming all decisions down the road go against Texaco, Texaco would still have the federal claims that are pleaded in this action, which it could litigate on the merits.

Federalism Concerns

[3] In spite of the foregoing it has been suggested that this Court should abstain or forebear in the issuance of an injunc-

tion because to do otherwise will violate basic principles of Federalism. These principles were first codified in the Anti-Injunction Statute of 1793; its current amended version is found at 28 U.S.C. § 2283. The Supreme Court expanded these principles when it developed the doctrine of federal abstention in *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and also in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). There is also present for consideration the more recently developed concept of "Our Federalism," first announced in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Section 2283 provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Supreme Court, however, has not interpreted this prohibition as strictly as it reads. In *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972), the Supreme Court held that any federal statute that created "a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding," *id.* at 237, 92 S.Ct. at 2159, provided an express authorization from Congress for a suit injunction. The Court further held that because § 1983 was enacted to redress inadequate state court remedies it provided the necessary specific authorization. Each of plaintiff's federal claims is properly brought pursuant to § 1983. *See Maine v. Thiboutot*, 448 U.S. 1, 7-8, 100 S.Ct. 2502, 2505-06, 65 L.Ed.2d 555 (1980) (plaintiff may enforce federal statutory rights in a § 1983 action); *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973) (plaintiff may enforce due process claims in a § 1983 action); and *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 (6th Cir.1982) (Williams Act). *Henry v. First National Bank of Clarksdale*, 595 F.2d 292, 299 (5th Cir.1979).

The *Younger* concerns, which we must consider apart from the § 2283 analysis, similarly are not implicated here. The Supreme Court first enunciated the *Younger* doctrine to bar

federal interference in pending state criminal prosecutions. Since then the doctrine has been applied to civil proceedings only where the state has demonstrated a vital concern in the unimpaired operation of its laws. *See Moore v. Sims*, 442 U.S. 415, 425, 99 S.Ct. 2371, 2378, 60 L.Ed.2d 994 (1979). Thus the Court has limited the application of the *Younger* doctrine to those instances where a state was engaged in directly advancing important state interests in the state courts.

Indeed in each of the cases proposed by Pennzoil, the pending state actions were akin to criminal proceedings, or were necessary to insure the proper functioning of the state judicial system, e.g., in contempt citations or lawyers disciplinary proceedings. They concerned such contexts as the enforcement of an anti-obscenity statute, *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); the application of an emergency child protection statute, *Moore v. Sims*, *supra*; the recovery of public assistance benefits fraudulently obtained, *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977); the enforcement of a civil contempt citation, *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); and the conduct of a state bar disciplinary hearing, *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982).

Pennzoil also relies on *Middlesex County Ethics Committee*, *supra* to support its abstention argument. In that case, the Supreme Court ordered the federal district court to abstain from enjoining a state bar disciplinary proceeding on the ground that the federal plaintiff would have an adequate opportunity to interpose his federal constitutional defenses in that forum. *Id.* at 437, 102 S.Ct. at 2524. No such encroachment on state proceedings would result from granting the proposed equitable relief in this case. Far from impairing the operation of the state judicial system, this relief would now facilitate presentation to the Texas state courts of Texaco's challenge to the Judgment prior to an inevitable dismemberment caused by the bond provision, which would otherwise

attenuate both the appellant and the force of the appeal. The concerns of the federalism impelling the *Middlesex* decision are therefore not implicated here.

In each of the cases relied upon by Pennzoil, intervention by the federal court would have impaired seriously the pursuit of state interests. Such is not the case here. The preliminary injunction in this case will neither interfere with a state official's pursuit of a fundamental state interest nor enjoin a state proceeding. The sole purpose of this equitable relief is simply to afford Texaco an effective opportunity to initiate and complete appellate proceedings in Texas, followed by petition for *certiorari* to review in the Supreme Court without immediate enforcement of the Judgment.

The significance of the State of Texas' interest as defined by Pennzoil, *viz.*, the "proper functioning of its judicial system" does not necessarily cut in Pennzoil's favor. By its proposed "unilateral stipulation" Pennzoil purports to accord the Texas trial judge the discretion to impose security in a sum or form different from the total amount of the Judgment. Thus, Pennzoil is prepared not only to waive its right to a bond in the full amount of the Judgment plus interests and costs, but also to waive whatever important state interests underlie the procedures found in Rule 364(b). That these interests can be so easily waived by a private litigant, if they can, suggest that they are less than fundamental to the functioning of the Texas state judicial system.

Pennzoil's report that the trial judge had stated that he would grant Texaco's motion for a new trial unless Pennzoil's attorneys consented to Paragraph 7 of the Judgment (the "standstill" provision), suggests that he evidently thought that the state interest dictated some sort of relief to Texaco from the bond requirements of Rule 364. I conclude that only the most attenuated state interest is reflected in a rule which can be so waived or circumvented by a private litigant.

The *Pullman* abstention doctrine is even more restricted than the other two limitations on Federal Courts. In sum, this doctrine requires the federal court to abstain from decision

where resolution of an unclear state law can avoid a substantial constitutional question. *Reetz v. Bozanich*, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970). Here, the state law is clear and the Texas state court judge has proved unable to circumvent the Draconian effect of the local law denying an unsecured stay pending appeal, without some sort of consent from Pennzoil.

Nor does the abstention doctrine embraced by the Court in *Burford*, *supra*, dictate that this Court stay its hand here. That case turned on the complexity of a state administrative scheme with which the state court had far greater expertise and knowledge.

Finally, we note that the imposition of this sort of injunction is hardly unique. In *Henry v. First National Bank of Clarksdale*, *supra*, the Court of Appeals upheld a district court order enjoining the enforcement of a final judgment against a state court defendant. In *Henry*, as in this case, the relatively large size of a damage award which was immediately enforceable against the state court defendants threatened irreparable harm to them if they attempted to post the required bond. *Henry*, 595 F.2d at 297.

Pennzoil has made an impressive effort to exsanguinate *Henry* as an available precedent for this case. *See* Pennzoil Memo at 30-33. Pennzoil argues, for example, that Texaco has not exhausted its state remedies, as the federal court plaintiffs did in *Henry*. It is well established, however, that exhaustion of state remedies is not a prerequisite to 1983 relief in Federal Courts. *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). In other instances the Supreme Court has not required that federal plaintiffs exhaust their state appeals before obtaining federal injunctive relief. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1976) (holding that such exhaustion is not required where the injunctive relief will not "annul the results of a state trial").

Pennzoil has also suggested that *Henry* is unique because the state court judgment had imposed restraints upon a "clear federal interest," *viz.* the federal plaintiff's free exercise of

their First Amendment rights. The plaintiffs in *Henry*, however, did not succeed in vindicating this "clear federal interest" until three years later, when the United States Supreme Court reversed the Mississippi State Supreme Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). While federal courts often declare that First Amendment rights are "special" the *Henry* Court made no attempt to limit the scope of its relief to Constitutional claims in general, or First Amendment claims in particular.

Thus, we find *Henry*, in its essential facts, indistinguishable from the instant case and embrace its analysis.

Accordingly, this Court finds there is no legal bar, and no genuine issue of disputed relevant fact that prevents granting this injunction. There is absolutely no reason in the world why it should not be granted.

Security

The next issue for consideration is what security should be required of Texaco pursuant to Rule 65(c), F.R.Civ.P. and as a condition for the provisional relief being granted. This Court is concerned lest other creditors of Texaco will come romping around the executive offices or run into the courts seeking to perfect security interests higher than that which would be available to Pennzoil. This would be unfair to Pennzoil, and it would also be contrary to the public interest and will have a deleterious effect on Texaco. Accordingly, the Court believes that this provisional remedy being granted here today must be secured by assets or obligations at least equal in value to what this Court regards as the maximum amount of compensatory damages which are likely to be awarded to Pennzoil on appeal or at a new trial limited to damages if such were to be granted.

This Court assumes that the price which Texaco paid for the Getty interests was an arm's length price representing the fair market value of what was acquired at the time and place it was bought and sold. Assuming that Pennzoil's claim that it had a valid contract will be upheld on appeal, since that contract price was $15.50 per share less than the price Texaco paid for the same assets, then the benefit of the bargain lost by

Pennzoil is, as observed earlier, approximately $800 Million. To this must be added an element for interest and costs and attorneys fees. The Court accordingly believes that a proper security for the provisional remedy being granted here today would be $1 Billion.

The Court will grant to Texaco a twenty (20) day period following entry of the order hereon, during which to propose and submit additional security for a preliminary injunction, beyond the sum of $1,000,000 posted to secure the Temporary Restraining Order, which shall be satisfactory to the Court, after having heard counsel for Pennzoil on that subject. Without limiting the future resolution of this matter by the Court, a letter or letters of credit, a surety bond, a deed or deeds of trust covering physical assets which are clearly of a value of that magnitude, a judgment lien, or any combination of those items, or anything else upon which the parties may agree, providing security in the amount of $1 Billion Dollars would be considered by this Court to be satisfactory. If the parties find it necessary to have a hearing as to the appropriateness of any security tendered by Texaco, that hearing may be held on 24 hours notice by application to the Deputy Clerk for an hour or date on which the Court will be available.

For the reasons set forth herein, the cross motion of defendant Pennzoil is denied.

The foregoing, together with certain formal supplemental findings of fact, to the extent that they are not inadvertently inconsistent with anything herein contained, constitutes the findings of fact and conclusions of the law of this Court pursuant to Rule 65(d), F.R.Civ.P. The Court directs that a formal order granting a preliminary injunction as requested be settled on five (5) days notice. The temporary restraining order previously granted herein is continued until such date as the formal order is actually signed and docketed.

The Court also directs that the status conference required pursuant to Rule 16, F.R.Civ.P. will be held by this Court on April 7, 1986 in Courtroom 31 at the United States Courthouse, 101 East Post Road, White Plains, New York 10601.

So Ordered.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9640 (CLB)

TEXACO INC.,

Plaintiff,

—against—

PENNZOIL COMPANY,

Defendant.

SUPPLEMENTAL FINDINGS OF FACT—
Dated January 10, 1986

Supplemental Findings of Fact found to the extent not inconsistent with this Court's opinion in writing of even date

I. BACKGROUND

A. *The Parties and the Getty Entities*

1. Plaintiff Texaco Inc. ("Texaco") is a Delaware corporation with a place of business in New York. (Amended Complaint, ¶ 11.)

2. Defendant Pennzoil Company ("Pennzoil") is a Delaware corporation with its principal place of business in Texas. (Amended Complaint, ¶ 12.)

3. Getty Oil Company ("Getty Oil") is a Delaware Corporation with its principal place of business in California. (Amended Complaint, ¶ 13.)

4. The Sarah C. Getty Trust (the "Trust") is a California Trust dated December 31, 1934. At all times relevant to this action, Mr. Gordon P. Getty served as sole Trustee ("Trustee") of the Trust. Before the consummation of the Texaco-Getty transaction set forth below, the Trustee held approximately 40.2% of the outstanding Getty Oil shares. (Amended Complaint, ¶ 14.)

5. The J. Paul Getty Museum (the "Museum"), before the consummation of the Texaco-Getty transaction set forth below, held approximately 11.8% of the outstanding Getty Oil shares. (Amended Complaint, ¶ 15.) (Getty Oil, the Trust, the Trustees and the Museum are occasionally referred to hereinafter as "the Getty entities".)

6. On December 28, 1983, Pennzoil announced a tender offer for 20% of the outstanding shares of Getty Oil at a price of $100 per share. (Amended Complaint, ¶ 19.)

7. On January 1, 1984, while its tender offer was still pending, Pennzoil proposed to Gordon Getty that Pennzoil acquire 3/7ths of the shares of Getty Oil at a price of $110 per share. (Amended Complaint, ¶ 19.)

8. During early January 1984, representatives of Getty Oil, including its investment bankers, initiated contact with Texaco and invited Texaco to submit a competing bid at a higher price than that offered by Pennzoil. The Getty Oil representatives later informed Texaco that the Getty Oil Board was also seeking competitive bids from other prospective purchasers. (Amended Complaint, ¶¶ 20-27.)

9. On the morning of January 4, Getty Oil and Pennzoil announced in two identically worded press releases that they had reached an "agreement in principle" to effect a merger. The press releases stated that the "agreement in principle" was

"subject to the execution of a definitive agreement". (Amended Complaint, ¶ 23.)

10. After the press releases had been issued, representatives of various of the Getty entities represented to Texaco on several occasions that the Getty entities were free to deal with Texaco and that no definite contract existed between the Getty entities and Pennzoil. (Amended Complaint, ¶¶ 23-26.)

11. Under the Pennzoil proposal, as announced in the press releases, the public shareholders of Getty Oil were to receive $112.50 per share for their Getty Oil shares. (Amended Complaint, ¶ 29).

12. In response to the Getty solicitations referred to above, Texaco made an initial offer of $125 per share in cash for all Getty shares. The Texaco offer was later increased to $128 per share in cash. (Amended Complaint, ¶ 29.)

13. The Getty Oil shareholders therefore were to receive $15.50 per share more under Texaco's offer than under Pennzoil's proposal. (Amended Complaint, ¶ 29.)

14. Pennzoil did not respond to Texaco's higher offer by timely raising its own offer. (Amended Complaint, ¶ 30.)

15. Between January 6, 1985, and January 8, 1985, Texaco signed definitive agreements with the Getty entities. The Getty Oil shareholders then overwhelmingly tendered their shares to Texaco, and the transaction was duly consummated. (Amended Complaint, ¶ 31.)

C. *Pennzoil v. Texaco*

16. On February 8, 1984, Pennzoil instituted suit against Texaco in the Harris County District Court, located in Houston, Texas, Pennzoil's principal place of business. The case was assigned to the Honorable Anthony J. P. Farris. (Amended Complaint, ¶ 32.) (This lawsuit is hereinafter referred to as the "*Pennzoil* action".)

17. Pennzoil's complaint alleged that Texaco had tortiously induced breach of a contract between the Getty entities and Pennzoil for the acquisition by Pennzoil of 3/7ths of the stock of Getty Oil. Pennzoil sought $7.53 billion in compensatory damages and $7.53 billion in punitive damages. (Amended Complaint, ¶ 33.)

18. Texaco answered Pennzoil's complaint on March 5, 1984. (Affidavit of Paul Curran ("Curran Aff."), sworn to December 20, 1985, ¶ 3.)

1. *The Campaign Contribution*

19. On March 7, 1984, Pennzoil's chief trial counsel, Joseph D. Jamail, made a lawful $10,000 campaign contribution to Judge Farris. At that time, Judge Farris was running unopposed in the upcoming May primary, and no opponent in the November 1984 election had yet been named. Neither Mr. Jamail nor Judge Farris disclosed to Texaco the $10,000 campaign contribution. (Curran Aff. ¶ 3.)

20. Texaco moved to recuse or disqualify Judge Farris under Canon 3C(1) of the Texas Code of Judicial Conduct, which provides for disqualification of a judge whose "impartiality might reasonably be questioned". Judge Farris declined to recuse himself. The Honorable E.E. Jordan denied Texaco's motion, accepting Pennzoil's argument that "mere bias" was insufficient basis for recusal or disqualification. (Curran Aff. ¶¶ 4-5.)

2. *Conduct of the Trial*

21. Pennzoil's presentation of its case-in-chief occupied the first two months of the four month trial of the *Pennzoil* action. During this period, Judge Farris maintained a relatively steady trial schedule. Shorty after Texaco commenced its case-in-chief, however, the Judge's health began to fail badly, so that he could hold court only infrequently. Of the 58 half-days available for Texaco's case-in-chief, only 21 were used. Texaco contends that its presentation was therefore necessarily dis-

jointed and confused and this contention presents fair ground for litigation. (Curran Aff. ¶ 15 & n.3.)

22. In late October 1985, after more than 3 months of trial, Judge Farris excused himself on account of illness. (Curran Aff. ¶ 15.)

23. The Honorable Solomon Casseb, a former Judge from San Antonio, then replaced Judge Farris. At that time, the trial was more than 75% complete and had generated over 17,000 pages of transcript. Judge Casseb stated that he had not read the record and would not read it. (Curran Aff. ¶¶ 15-16.)

24. Shortly after Judge Casseb entered the case, Texaco moved for a mistrial because of the new judge's unfamiliarity with the record. That motion was denied, and the trial proceeded to its conclusion before Judge Casseb. (Curran Aff. ¶ 16.)

3. *The Jury Charge*

25. During the charge conference, Judge Casseb again indicated that he was unfamiliar with the record and stated that he was relying on counsel in preparing his charge. (Curran Aff. ¶ 17.)

26. Both the parties and Judge Casseb agreed that the law of the State of New York, where the Pennzoil-Getty and Getty-Texaco negotiations occurred, should supply the rule of decision in the case. (Curran Aff. ¶ 17.)

27. Judge Casseb ultimately adopted Pennzoil's proposed charge substantially in its entirety. (Curran Aff. ¶ 18; *see also* Affidavit of G. Irvin Terrell ("Terrell Aff."), sworn to December 19, 1985, Exhibit 5.) Texaco has raised serious questions as to whether that charge accurately stated governing New York law in several material respects and whether the Special Issue findings of the jury were sufficient to support a judgment under New York law. (*See* Affidavit of Hugh R. Jones ("Jones Aff."), sworn to December 4, 1985, ¶¶ 12-40.)

4. *The Verdict and Entry of Judgment*

28. The case was submitted to the jury on November 15, 1985. After deliberating for approximately 9 hours, the jury returned a verdict in favor of Pennzoil, awarding compensatory damages of $7.53 billion and punitive damages of $3 billion. (Amended Complaint, ¶ 39; *see* Terrell Aff., Ex. 5.)

29. Under Texas procedure, judgment is entered upon a jury verdict for the plaintiff immediately upon denial of post-trial motions for judgment and for judgment notwithstanding the verdict, even though the defendant has 30 days to move for a new trial (*see* Tex. R. Civ. P. 329b(a)) and even though a motion for a new trial might not be denied for 45 days after being made (*see* Tex. R. Civ. P. 329b(c)).

30. On December 10, 1985, Judge Casseb granted Pennzoil's motion for judgment and denied Texaco's motions for judgment and for judgment notwithstanding the verdict and entered judgment for approximately $11.12 billion (the "Judgment"), representing $10.53 billion, the full amount of the jury's verdict, plus more than $600 million in prejudgment interest from January 6, 1985. (Affidavit of David Boies ("Boies Aff."), sworn to December 17, 1985, ¶ 3; Judgment, dated December 10, 1985.)

D. *The Lien and Bond Provisions of Texas Law*

31. Certain provisions of Texas law (hereinafter the "lien and bond provisions") applicable to the Judgment entitle a judgment creditor (a) to place liens upon the judgment debtor's real property located in Texas, and (b) to execute upon the judgment during the pendency of an appeal unless the appellant posts a supersedeas bond or other security in the full amount of the judgment, plus interest and costs.

1. *The Lien Provisions*

32. Section 52.001 of the Texas Property Code provides that "[a] first or subsequent abstract of judgment, when it is

recorded and indexed in accordance with this chapter, constitutes a lien on the real property of the defendant located in the county in which the abstract is recorded and indexed, including real property acquired after such recording and indexing". Tex. Prop. Code Ann. § 52.001 (Vernon 1984).

33. Under § 52.001 *et seq.*, a judgment creditor may obtain judgment liens by requesting state officials to perform certain tasks, which the pertinent state officials are directed to perform and lack authority or discretion to decline to perform:

(a) Section 52.002 of the Texas Property Code provides that "[o]n application of a person in whose favor a judgment is rendered or on application of that person's agent, attorney, or assignee, . . . the clerk of the court that rendered the judgment shall prepare and deliver to the applicant an abstract of the judgment". Tex. Prop. Code Ann. § 52.002.

(b) Section 52.004 of the Texas Property Code provides that "[t]he county clerk [in a county where the judgment debtor's real property is located] shall immediately record in the county judgment records each properly authenticated abstract of judgment that is presented for recording". Tex. Prop. Code Ann. § 52.004.

(c) Under § 52.001, the lien attaches immediately after the clerk indexes and records the abstract. Tex. Prop. Code Ann. § 52.001.

34. Under Section 52.006 of the Texas Property Code, "[a] judgment lien continues for 10 years following the date of recording and indexing the abstract, except that if the judgment becomes dormant during that period the lien ceases to exist". Tex. Prop. Code Ann. § 52.006.

35. Issuance of an abstract of judgment and its recording and indexing are ministerial acts that can be performed in a few minutes. (Affidavit of Thomas D. Barr ("Barr Aff."), sworn to December 17, 1985, ¶ 6.)

2. *The Bond Provisions*

36. Rule 627 of the Texas Rules of Civil Procedure provides that "[i]f no supersedeas bond . . . has been filed and approved, the clerk of the court . . . shall issue the execution upon such judgment upon application of the successful party or his attorney after the expiration of thirty days from the time a final judgment is signed". If a timely motion for new trial is made, the 30 day period runs "from the time the order overruling the motion is signed or . . . the motion is overruled by operation of law". Tex. R. Civ. P. 627.

37. Under Rule 364(a) of the Texas Rules of Civil Procedure, "an appellant may suspend the execution of the judgment by filing a good and sufficient bond to be approved by the clerk . . .". Tex. R. Civ. P. 364(a). Under Rule 364(b), for a money judgment, "the amount of the bond or deposit shall be at least the amount of the judgment, interest, and costs". Tex. R. Civ. P. 364(b). As an alternative to a bond, Rule 14c of the Texas Rules of Civil Procedure provides that "the party may in lieu of filing the bond deposit cash or other negotiable obligation of the government of the United States of America or any agency thereof, or with leave of court, deposit a negotiable obligation of any bank . . ., in the amount fixed for the surety bond . . .". Tex. R. Civ. P. 14c.

38. For Texaco to obtain a stay of execution of the $11.12 billion Judgment under the bond provisions, it would be required to post a bond or other security in an amount sufficient to cover not only the Judgment, but also costs and interest for a period of two years at a rate of 10%, compounded annually. The total amount of such a bond would exceed $13 billion. (Affidavit of James B. Sales ("Sales Aff."), sworn to January 3, 1986, ¶ 17.) As found below, Texaco could not post security in that amount and remain a viable entity. (*See* §§ 74-81, *infra*.)

3. *Relationship of the Lien and Bond Provisions*

39. The lien and bond provisions of Texas law operate independently of each other. Even if the judgment debtor has

posted a bond and obtained a stay of execution under the bond provisions, the judgment creditor may still place judgment liens upon the debtor's real property. *Thulemeyer v. Jones*, 37 Tex. 560, 571 (1872); *Smith v. Kale*, 32 Tex. 290, 294 (1869). *See also* Sales Aff. ¶ 20. Similarly, absent a bond and stay of execution, the judgment creditor may proceed to execute upon any of the debtor's real property even if he has not sought to attach the debtor's real property. Tex. R. Civ. P. 627.

II. *EFFECT ON TEXACO OF THE LIEN AND BOND PROVISIONS*

A. *The Threat Posed by the Lien and Bond Provisions*

40. Immediately after the jury entered its $10.53 billion verdict in the *Pennzoil* action, the business and financial community concluded that Pennzoil would be able, under the lien and bond provisions of Texas law, to commence enforcement of any judgment entered on the verdict before Texaco's appeals had been resolved. The prospect that a judgment rendered on the verdict would be enforced before any appellate review raised serious uncertainties about Texaco's financial stability during the appeal period. (Affidavit of Richard G. Brinkman ("Brinkman Aff."), sworn to December 17, 1985, ¶ 6.)

41. As a result, persons became fearful that either (a) Texaco would fail to secure a $12 billion bond and its assets would be subject to execution or (b) there would be a liquidation of a substantial portion of Texaco's assets in an effort to raise the bond, and that in any case (c) Pennzoil would be able to place liens upon Texaco's real estate in Texas (and possibly in other states) immediately after entry of judgment and even if Texaco were to post a bond and obtain a stay of execution. (Affidavit of Julius L. Katz ("Katz Aff."), sworn to December 19, 1985, ¶ 5; Brinkman Aff. ¶¶ 7, 8.)

42. If Pennzoil were thus to execute upon or attach Texaco's assets, Texaco would suffer a substantial depletion of its asset base and severe impairment of its financial strength, and

would probably be compelled to enter bankruptcy, before an appeal from a judgment could even begin. (Brinkman Aff. ¶¶ 7, 8(a).)

B. *Paragraph 7 of the Judgment and Its Inadequacy*

43. [Deleted, see Rule 408 Fed. R. Evid, as irrelevant and privileged]

44. The purpose of Paragraph 7 of the Judgment was ostensibly "to preserve the status quo" while the *Pennzoil* action remained within the jurisdiction of the Texas trial court. (Judgment, ¶ 7.)

45. Paragraph 7 of the Judgment provides, *inter alia*, that:

"(a) Pennzoil shall not abstract, or request, or attempt to file any abstract of Judgment in this matter or file, register, levy or execute thereon or otherwise attempt to collect the Judgment in the State of Texas or elsewhere by reason of this Judgment by this Court in the matter without permission of this Court.

"(b) Texaco shall not pledge, encumber, convey, or otherwise dispose of any of its assets other than in the routine and ordinary course of business without permission of this Court. Financing involving sales or pledges of receivables or inventory are agreed to be in the ordinary course of business.

"(c) Texaco shall keep intact and not encumber, except in the routine and ordinary course of business, any of the properties and assets now owned by Texaco which were formerly owned by Getty Oil Company and its affiliate entities without permission of this Court." (Judgment, ¶ 7(a)-(c).)

46. By its terms, Paragraph 7 of the Judgment is effective only for so long as the Texas trial court retains jurisdiction of the *Pennzoil* action. (Judgment, ¶ 7(g)). Under Texas procedure, the Texas trial court will have jurisdiction of the *Pennzoil* action for not more than 105 days from the entry of the

Judgment on December 10, 1985, *i.e.*, until not later than March 25, 1986. (Barr Aff. ¶ 2.)

(a) Under Tex. R. Civ. P. 329b, the trial court retains jurisdiction to grant a new trial or to vacate, modify, correct or reform a judgment for 30 days after the judgment is signed. Tex. R. Civ. P. 329b. A motion for new trial must be made within this 30-day period. Tex. R. Civ. P. 329b(a). Texaco must therefore move for a new trial within 30 days after the signing of the Judgment on December 10, 1985, *i.e.*, on or before January 9, 1986. (Sales Aff. ¶ 13.)

(b) Under Tex. R. Civ. P. 329b(c), if a trial court fails to render a decision on a motion for new trial, the motion is overruled by operation of law 75 days after the judgment was signed. Tex. R. Civ. P. 329b(c). If Texaco moves for a new trial, its motion will be overruled by operation of law on February 23, 1986, if not acted upon sooner. (*Id.*; Sales Aff. ¶ 14.)

(c) Once a motion for new trial has been overruled, either by express ruling or by operation of law, the Texas trial court retains jurisdiction for a period of 30 days thereafter, even if an appeal is perfected in the meantime. Tex. R. Civ. P. 329b(e). After expiration of this 30-day period, however, trial court juris diction ceases. Tex. R. Civ. P. 329b(f). Thus, if Texaco moves for a new trial on January 9, 1986, trial court jurisdiction of the *Pennzoil* action could cease as early as February 8, 1986, if the new trial motion is immediately denied, and must cease, if the motion is denied by operation of law, on March 25, 1986, at the latest. (Sales Aff. ¶¶ 15, 16.)

47. Pennzoil has conceded that Paragraph 7 of the Judgment may be vacated or modified, or Pennzoil may be permitted to execute on the Judgment, at any time, after hearing on proper notice to Texaco. (Memorandum in Opposition to Texaco's Motion for a Preliminary Injunction and in Support

of Pennzoil's Cross-Motion to Dissolve the TRO and Dismiss the Amended Complaint, at 15-16.)

48. As set forth in detail below, Texaco's financial standing has greatly deteriorated despite Paragraph 7 of the Judgment. Paragraph 7 is effective only for a short period of time and can be modified or lifted, after notice and hearing, at any time. Under Paragraph 7, therefore, Pennzoil can soon commence to attach or execute upon Texaco's property in any event, and it may be able to do so before Paragraph 7 would otherwise expire; also Paragraph 7 forbids Texaco to transfer, encumber, convey or otherwise dispose of any of its assets, and to "keep intact" the assets formerly owned by Getty Oil, except "in the routine and ordinary course of business". Because the meaning of this phrase is uncertain, financial institutions and trade creditors are increasingly reluctant to deal with Texaco for fear that contemplated transactions would later be held invalid under Paragraph 7. (Affidavit of Donald P. Brennan ("Brennan Aff."), sworn to December 17, 1985, ¶ 8.)

C. *The Judgment's Severe Impact on Texaco's Standing in the Financial Markets, Notwithstanding Paragraph 7*

49. As detailed below, the threat that Pennzoil would enforce the lien and bond provisions before any appeal severely impaired Texaco's standing in all financial markets and imposed immediate and severe financial burdens upon the company even before the Judgment was entered.

1. *The Stock Market*

50. During the week immediately prior to the jury verdict, Texaco Inc.'s shares traded in the $39-1/2 range with daily volume averaging about 400,000 shares. After the verdict was rendered, the market for Texaco Inc.'s shares has been extremely volatile, with daily trades reaching 11 million shares on November 27, 1985, and the share price sinking to $31-1/2 as of December 6, 1985. Following entry of the Judgment on December 10, the value of Texaco's common stock fell still

further, closing at $28-7/8 on December 12. (Brinkman Aff. ¶ 11.)

2. *The Long-Term Debt Market*

51. Texaco has approximately $3.6 billion in bonds outstanding in the Eurodollar market. Prior to the jury's verdict, trading was relatively light and Texaco bonds traded at 60 to 70 basis points over comparable term United States Treasury Bonds. Immediately following the jury's verdict, the spread increased to 150 to 160 basis points over Treasury bonds. In the weeks following the verdict, the spread continued to widen and as of December 8, 1985, stood at 300 to 325 basis points over comparable Treasury bonds. Since entry of the Judgment on December 10, the market for Texaco's Eurodollar bonds has virtually disappeared. (Brinkman Aff. ¶ 12.)

52. Texaco has approximately $3.6 billion in bonds outstanding in the United States public market. In the few trades that were being made in the period shortly before entry of the Judgment, Texaco's medium term bonds were trading in the range of 300 basis points over comparable United States Treasury bonds. After entry of the Judgment, prices of Texaco's debt securities deteriorated further. (Brinkman Aff. ¶¶ 12, 13; see also Brennan Aff. ¶ 15.)

3. *The Ratings Agencies*

53. At the end of the third quarter of 1985, Texaco's long-term bonds were rated A1 by Moody's and A+ by Standard & Poor's. Securities rated A by Moody's "possess many favorable investment attributes and are to be considered as upper medium grade obligations." Securities rated A by Standard & Poor's have "a strong capacity to pay interest and repay principal . . . ." Such A rated securities are of investment grade, eligible to be held by fiduciaries and by insurance companies under legal investment rules. (Brinkman Aff. ¶ 4.)

54. At the end of the third quarter of 1985, Texaco's commercial paper was rated Prime-1 by Moody's and A-1 by

Standard & Poor's. Issuers rated Prime-1 by Moody's "have a superior capacity for repayment of short-term promis sory obligations". Standard & Poor's A-1 rating "indicates that the degree of safety regarding timely payment is either overwhelming or very strong". (Brinkman Aff. ¶ 5.)

55. On December 11, 1985 (the day after the entry of the Judgment, including Paragraph 7), Moody's, one of the major financial rating agencies, downgraded Texaco's senior debt securities from their prior investment grade level of A1 to the speculative, non-investment grade level of Ba1, indicating that Texaco's bonds "generally lack characteristics of a desirable investment". Moody's also downgraded Texaco's commercial paper from Prime-1, its highest level, to not prime. In its press release announcing that action, Moody's cited "the increasing possibility of a potentially crippling bond requirement, particularly in the appeals process". (Brinkman Aff. ¶ 14.)

56. On December 13, 1985, Standard & Poor's, the other major rating agency, lowered its rating of Texaco's senior debt from A+ to B, a category described as "predominantly speculative". Standard & Poor's also lowered its rating of Texaco's commercial paper from A-1 to C, a category described as having "doubtful capacity for payment". Standard & Poor's cited as a major factor in its decision the increasing likelihood of bankruptcy if Texaco were forced to post $12 billion in security for the Judgment. (Brinkman Aff. ¶ 15.)

57. These actions by the ratings agencies have foreclosed a significant—and for an issuer the most desirable—segment of the capital markets from purchasing Texaco's senior debt securities. Institutional investors with fiduciary responsibilities and legal investment requirements, such as insurance companies, pension funds and bank trust departments, are precluded from acquiring non-investment grade securities. (Brinkman Aff. ¶ 16.)

4. *The Commercial Paper Markets*

58. The uncertainty relating to Texaco's financial stability caused by the lien and bond provisions has caused Texaco to withdraw from the commercial paper market, which was previously a major source of short-term unsecured funds for the company because its paper cannot be sold at reasonable competitive discount rates in light of the uncertainty. (Brinkman Aff. ¶ 17.)

59. Texaco's inability as a practical matter to sell commercial paper has placed great strains upon the company. During the week of November 25, 1985, prior to entry of the Judgment, holders of 10% of the dollar value of Texaco's outstanding commercial paper requested that Texaco repurchase its paper. At that time, Texaco attempted to accommodate holders; for example, on November 27, 1985, Texaco redeemed $125 million of its commercial paper held by a commercial bank trust department. After entry of the Judgment, holders of an additional 11% of Texaco outstanding paper demanded repurchase. Texaco declined to repurchase its paper. (Brinkman Aff. ¶¶ 17, 18.)

60. Texaco will not be able to roll over its current outstanding obligations of approximately $2.4 billion as they mature. Texaco must therefore redeem its paper in full and in cash at maturity. Approximately $600 million matured by December 31, 1985, and an additional $600 million will mature by January 31, 1986. (Brinkman Aff. ¶ 19.)

5. *Commercial Banking Relationships*

61. Texaco relies upon commercial bank lending as an alternative source of short-term financing. Since entry of the Judgment, several major banks with which Texaco has had long-standing commercial relationships, including Bankers Trust Company and Morgan Guaranty Trust Company of New York, have informed Texaco that they will not make unsecured loans to the Company because of the threats that prior judgment liens may attach to Texaco's assets, or that Texaco may

undergo the financial strains of raising a $12 billion bond or suffering execution on the Judgment, prior to any appeals. (Brinkman Aff. ¶ 20.)

62. In addition to this inability to obtain new unsecured bank loans, Texaco cannot borrow under its authorized bank credit lines of approximately $4 billion. Before drawing on these lines, a borrower is required to represent that there has been no "material adverse change" in its financial condition in the period since the credit line was established. In view of the Judgment and the uncertainties about the lien and bond provisions, Texaco will not be able to make that representation. At least one bank has advised Texaco that it will not lend under the lines without such a representation. (Brinkman Aff. ¶ 21.)

63. Other banks with which Texaco has banking relationships have refused to provide customary forms of financing and banking services.

(a) Morgan Guaranty, Citibank, N.A., and Manufacturers Hanover Trust Company have refused to issue a $5 million unsecured letter of credit needed to cover a performance guarantee in connection with Texaco's current drilling obligations in Angola.

(b) Certain banks have requested that Texaco make cash deposits or have available funds in its accounts before they will transfer funds for payment of large crude oil and other obligations.

(c) Some of the banks that regularly handle Texaco's foreign exchange transactions, including Credit Suisse and Bank of Montreal, have been reluctant to quote foreign exchange forward contracts at a market price. Morgan Guaranty will not quote such contracts. If this trend continues, Texaco will be unable to meet its significant foreign currency requirements.

(d) Morgan Guaranty, the lender on an $85 million pipeline project Texaco is undertaking in the United States with Seagull Corporation, has expressed concern about

the status of that loan and has requested to meet with operating management. (Brinkman Aff. ¶ 22.)

6. *Trade Creditor and Co-Venturer Relationships*

64. Suppliers to Texaco have become increasingly concerned about the company's financial position in view of the possibility that the lien and bond provisions may force Texaco into bankruptcy. Such suppliers have increasingly been requesting either cash payments or security in the form of bank letters of credit.

(a) Major oil companies including Sonatrach (Algeria), C. Itoh & Co. Ltd., and Petro Lewis Corp., suppliers of the crude oil which constitutes the lifeblood of Texaco's operations, have insisted on letters of credit before supplying Texaco with additional crude oil. Other major suppliers, including Exxon Corp., Atlantic Richfield Co. and Shell Oil Company, have informed Texaco that supply contracts with Texaco are being reviewed in light of the Judgment.

(b) Southern California Edison, a major supplier of power to Texaco, has insisted that Texaco make weekly payments for electricity, effectively requiring Texaco to purchase power on a cash basis. (Brinkman Aff. ¶ 24.)

65. Some companies contemplating major commercial ventures with Texaco have reconsidered their plans in view of the uncertainties created by the lien and bond provisions. For example, on December 12, two days after the Judgment was entered, the Nippon Oil Company announced that it would delay a planned $100 million exploration program in Texaco's oilfields located in the United States, because of the uncertainties raised by the Judgment. (Brinkman Aff. ¶ 25.)

66. Other companies engaged in commercial ventures with Texaco have found their own financial standing impaired by virtue of their mere association with Texaco. For example:

(a) LOCAP Inc., a pipeline company 31% owned by Texaco, has been unable to roll over its commercial paper,

requiring all of LOCAP's owners to put up cash. (Brinkman Aff. ¶ 26.)

(b) On December 18, 1985, Moody's downgraded approximately $622 million in revenue bonds issued to construct the Louisiana Offshore Oil Port ("LOOP"), citing the fact that "Texaco is a 26.6% owner of the facility and a guarantor of part of its debt" and "the possibility of an acceleration of debt and . . . bankruptcy". (Supplemental Affidavit of Richard G. Brinkman ("Supp. Brinkman Aff."), sworn to December 19, 1985, ¶ 3.)

(c) On December 18, 1985, approximately $700 million in long-term debt of Pembroke Capital Co., a joint venture owned 65% by Texaco and 35% by Chevron Corp. that operates a processing unit in Wales, was downgraded to a speculative rating. (Supp. Brinkman Aff. ¶ 4.)

(d) On December 18, 1985, Moody's downgraded to a speculative rating approximately $20 million of financial paper issued by Magic Finance Co., a Texas pipeline company partly owned by Texaco, because its commercial paper is guaranteed by Texaco. (Supp. Brinkman Aff. ¶ 5.)

(e) On December 18, 1985, Standard & Poor's Corp. announced that it had placed on its "creditwatch" list for possible downgrading the commercial paper and senior debt ratings of five pipeline companies partly owned by Texaco: Badger Pipeline Co. (22% owned by Texaco); Colonial Pipeline (14.27% owned by Texaco); Explorer Pipeline Co. (15.97% owned by Texaco); LOCAP Inc. (30.8% owned by Texaco); and Loop Inc. (26.6% owned by Texaco). (Supp. Brinkman Aff. ¶ 6.)

(f) After entry of the Judgment, the Seminole Pipeline, in which a Texaco subsidiary is a joint venturer, was unable to roll over its commercial paper and was required to draw on back-up bank commitments, which must be

refinanced by January 3, 1986. (Supp. Brinkman Aff. ¶ 7.)

D. *Impairment of Texaco's Operating Flexibility*

67. In addition to its failure to stem the adverse effects upon Texaco's standing within the financial markets and with trade creditors and co-venturers, discussed above, ¶ 7 of the Judgment has affirmatively impaired Texaco's ability to enter into transactions that are helpful to its business. (Affidavit of James W. Kinnear ("Kinnear Aff."), sworn to December 17, 1985, ¶ 6.) Under Paragraph 7, Texaco may not "pledge, encumber, convey, or otherwise dispose of" any of its assets, and must "keep intact" its Getty Oil assets, except "in the routine and ordinary course of business". (Judgment ¶ 7(b), (c).) As set forth below, uncertainties concerning the scope of this exception have hampered Texaco's operating flexibility.

68. Texaco is a very large company, constantly seeking to deploy its assets with optimal efficiency. As such, it frequently enters into sales transactions, both in this country and abroad, which are substantial in that they involve many millions of dollars, but which nonetheless do not involve a significant proportion of Texaco's assets. (Kinnear Aff. ¶¶ 7-14.)

69. Prospective purchasers of Texaco's assets as well as their advisers and lenders have been unwilling to assume that such multi-million dollar transactions fall within the "routine and ordinary course of business" as that term is used in Paragraph 7 of the Judgment. This uncertainty and unwillingness to deal with Texaco have hampered its ability to redeploy its assets efficiently, as it must to remain competitive. (Kinnear Aff. ¶¶ 15-16.)

70. The uncertainties caused by Paragraph 7 have also effectively prevented Texaco from obtaining secured financing except through the pledge or sale of inventory or receivables. Under Paragraph 7, lenders to Texaco face the risk that such secured financing will later be determined to have been other than "in the routine and ordinary course of business" within

the meaning of Paragraph 7(b). Faced with this uncertainty, prospective secured lenders are reluctant to proceed with transactions with the Company. (Brinkman Aff. ¶ 29(b).)

E. *The Threat of Bankruptcy Caused By the Lien and Bond Provisions*

1. *Attachment of Liens*

71. Texaco's real property in Texas that is subject to attachment under the lien provisions has a total value of approximately $5 billion and comprises many of Texaco Inc.'s producing oilfields. On the basis of the Judgment, approximately 22 other states would permit Pennzoil to place liens on Texaco Inc.'s real property situated in those states. (Brinkman Aff. ¶ 8(a).)

72. Because Texaco does not now have any significant secured creditors, the lien provisions would make Pennzoil Texaco's only significant secured creditor at a time when the liens would cut off much of Texaco's cash flow. This sudden alteration in Texaco's debt structure and financial condition would cause lenders, suppliers and other creditors to cut off credit and supplies to the company. The effect would probably be to force Texaco into bankruptcy prior to any appeal or, indeed, even before the completion of proceedings in the trial court. (Brinkman Aff. ¶ 8(a).) (Barr Aff. ¶ 7.)

73. Attachment of judgment liens could also trigger default and acceleration provisions in indentures governing over $440 million of Texaco's long-term debt. Default under those provisions would, in turn, trigger cross-defaults under still other indentures, accelerating the maturity of a further $1.3 billion of Texaco's long-term debt. Such defaults would render Texaco unable to obtain additional credit while requiring it to raise $1.74 billion (on top of all its other cash needs) to pay the accelerated indebtedness. (Brinkman Aff. ¶ 8(b).)

2. *The Bond Requirement*

74. Texaco could not obtain a surety bond in an amount even approaching $12 billion from any insurance company or combination of insurance companies. The estimated surety bond capacity available world-wide ranges from $1 billion to $1.5 billion under the best possible circumstances. Further, a surety bond in those amounts would require full collateralization. (Brinkman Aff. ¶ 31.)

75. Texaco cannot post cash collateral in lieu of a bond in that amount. Texaco does not have sufficient liquid assets, or assets which are readily convertible to liquid assets through domestic borrowings, and does not have access to such assets, to provide $12 billion in cash or cash equivalents. As of September 30, 1985, Texaco had cash, cash equivalents and marketable securities of $1.5 billion. These assets are required to run Texaco's business. Thus, the funds necessary to satisfy a bond would have to be borrowed. (Brinkman Aff. ¶ 32.)

76. Given the strains (detailed above) that the size of the verdict and the threat of the lien and bond provisions have placed upon Texaco's finances, Texaco could not borrow $12 billion on an unsecured basis in the present circumstances. (Brinkman Aff. ¶¶ 32, 33; Affidavit of John F. McGillicuddy ("McGillicuddy Aff."), sworn to December 19, 1985, ¶ 3; Affidavit of David D. Burrows ("Burrows Aff."), sworn to December 19, 1985, and Letter from David D. Burrows to Edward W. Wolahan, dated December 19, 1985, annexed thereto.)

77. Neither can Texaco raise the necessary sum by pledging or mortgaging its assets. Texaco's outstanding unsubordinated debt securities require that, when Texaco borrows on a secured basis, its unsubordinated debt securities must be secured equally and ratably. If Texaco Inc. were to borrow on the security of its principal properties in order to support a bond, it would actually have to secure borrowings substantially in excess of the $12 billion necessary for the bond in order to

avoid default on its unsubordinated debt securities. Texaco currently has $5.7 billion in outstanding unsubordinated debt securities which contain such restrictions on liens; thus, Texaco Inc. would have to pledge or cause to be pledged at least an additional $5.7 billion in assets, over and above the $12 billion needed to obtain a bond. Further, because lenders would require a significant margin of security to lend in such circumstances, Texaco would actually have to provide collateral in an amount well above this $17.7 billion total. (Brinkman Aff. ¶ 35.)

78. Assuming that Texaco Inc. could borrow up to $12 billion, cash flow available from operations thereafter would not be sufficient to pay the full service cost of the debt, especially in the declining crude oil market. Furthermore, borrowing of that magnitude would effectively destroy the financial condition and flexibility of the company. The debt to capitalization ratio would be increased to over 90% and interest coverage would be only slightly over 1 to 1. Funds would not be available for payment of dividends or for the capital expenditures which would be essential if the company were to continue to operate on a viable basis. (Brinkman Aff. ¶ 36.)

79. Texaco could probably not finance a $12 billion bond through resort to the high yield, or junk bond, market. Even the comparatively risk-accepting investors who purchase these securities might be hesitant to purchase debt securities from a company with Texaco's pro forma credit position as adjusted to reflect the Judgment and the requirement of a bond. Moreover, the amount of financing that the company could raise through junk bonds would be insignificant when compared to its operating needs and the $12 billion bond requirement. In 1985, through mid-December, the total junk bond market had raised approximately $14.8 billion, with the largest single issue producing less than $1 billion of total proceeds. In addition, any junk bond financings would have to be accomplished in a market that, as of mid-December 1985, had an

issue backlog of $6 to $8 billion and was saturated with previously unsold issues. (Brennan Aff. ¶ 20.)

80. Finally, while Texaco could attempt to raise cash by liquidating assets, it is doubtful that such a liquidation, which would necessarily occur on a distress sale basis in a very short period of time, would yield $12 billion. (Brinkman Aff. ¶ 37.) The list of potential buyers for major energy assets has been reduced dramatically due to the significant energy company acquisitions, mergers and industry restructurings that have occurred over the past four years, and many of the remaining firms are so highly leveraged as to bar further substantial acquisitions. The current uncertainty surrounding future energy prices has also made prospective buyers more cautious and less likely to submit fully-priced bids. Thus, while some Texaco properties could be sold quickly (particularly to existing partners), the dollar value received for these assets would likely be less than fair value, even if an orderly sale process were implemented. (Brennan Aff. ¶ 17.)

81. In any event, at the end of such a massive liquidation, Texaco would be a depleted and dismembered enterprise, consisting of cash or cash equivalents and a liability of roughly $12 billion to Pennzoil, plus existing senior and subordinated debt of $7.2 billion and numerous other liabilities, which the company would be unable to service or pay. (Brinkman Aff. ¶ 37.)

F. *The Inability of Texaco to Obtain Adequate Relief in the Texas Courts*

82. On December 13, 1985, William R. Edwards, co-counsel for Texaco, wrote to the Texas trial court urgently requesting a conference to consider whether any modification of the Judgment, and particularly of the provisions of Paragraph 7, could be made to offer assurance to lenders and others who deal with Texaco that Pennzoil would not take steps to attach judgment liens or otherwise execute on the Judgment pending appeal. (Boies Aff. ¶ 9 and Exhibit 8 thereto.)

83. By handwritten note dated December 13, 1985, the Texas trial court responded that it was available, subject to agreement of all counsel, for a hearing on December 16, 17 or 18. (Boies Aff. ¶ 10 and Exhibit 9 thereto).

84. By telephone on December 14, 1985, counsel for Pennzoil notified counsel for Texaco that Pennzoil would not agree to a hearing on any of the dates indicated by the Texas trial court or at any other time, and that Pennzoil would have no further response to Texaco's request for a hearing. (Boies Aff. ¶ 10 and Exhibit 10 thereto.)

85. By letter dated December 14, 1985, counsel for Texaco advised the Texas trial court of Pennzoil's refusal to agree to any hearing date and again requested that the court set a date for a hearing. (Supp. Boies Aff. ¶ 3 and Exhibit 13 thereto.)

86. On December 16, 1985, Pennzoil's counsel wrote to the Texas trial court urging that Texaco's request for a hearing be denied and that any similar request be governed by the timing and notice provisions of the Texas Rules of Civil Procedure. (Supp. Boies Aff. ¶ 4 and Exhibit 14 thereto.)

87. On December 17, William R. Edwards, co-counsel for Texaco, received a letter from the Texas trial court dated December 16, 1985, which stated that "the record in this case does not show you or your firm as 'attorney of record' for Texaco Inc." and that "this Court does not act on any 'ex parte communications' " and requires "adherence to the rules as to notices and requests for hearings thereon". (Supp. Boies Aff. ¶ 5 and Exhibit 18 thereto.)

88. Mr. Edwards had filed a notice of appearance as counsel for Texaco at the December 10 hearing when the Judgment was entered. His appearance for Texaco had been recorded in the transcript of the hearing. He had addressed the Texas trial court at the December 10 hearing without objection from the court or counsel for Pennzoil, had signed the Judgment at the court's request and had written by hand the interlineations appearing on the Judgment. (Boies Aff. ¶ 13.)

89. Mr. Edwards' letters of December 13 and 14 addressed to the court were not ex parte communications. They were contemporaneously delivered to all counsel, and they indicated that they were so delivered. (Boies Aff. ¶ 13.)

90. By letter of December 17, Richard P. Keeton, co-counsel for Texaco, advised the Texas trial court that (a) Mr. Edwards was in fact an attorney of record for Texaco and (b) the letters of December 13 and 14 were not submitted ex parte. Mr. Keeton again urged the court to set a hearing, as requested in the letters of December 13 and 14. (Supp. Boies Aff. ¶ 6 and Exhibit 16 thereto.)

91. To date, the Texas trial court has not scheduled a hearing.

2. *The Inability of the Texas Trial Court to Grant Relief*

92. The Texas bond provision is mandatory and grants the Texas courts no discretion to reduce the amount of the bond required. The provision states that "the amount of the bond or deposit *shall be at least* the amount of the judgment, interest and costs." (Tex. R. Civ. P. 364(b) (emphasis added).)

93. Texas courts and commentators have uniformly held that the bond provision is non-discretionary. (*See, e.g., Haney Elec. Co. v. Hurst*, 608 S.W.2d 358, 356 (Tex. Civ. App. 1980) ("[a] money judgment may not be partially superseded"); *Mudd v. Mudd*, 655 S.W.2d 128, 130 (Tex. Civ. App. 1983) ("Rule 364 . . . prescribes the least amount at which the bond can be set"); *Opinions of Subcommittee on Interpretation of Rules* ("[t]he bond should therefore be in a sum *at least* the amount of the judgment plus . . . interest . . . [and] costs. . . . This Rule contains *no exception* that would allow a supersedeas of a part of an entire judgment for damages") (quoted in *Tex. Rules Civ. Proc. Ann.*, pp. 159-60 (Vernon's 1985) (emphasis added); *see also Deal v. Bonner*, 667 S.W.2d 635 (Tex. Civ. App. 1984); *Fortune v. McElhenney*, 645 S.W.2d 934 (Tex. Civ. App., no writ); *Cooper v. Bowser*, 583 S.W.2d

805 (Tex. Civ. App. 1979, no writ); *Schrader v. Garcia*, 512 S.W.2d 830 (Tex. Civ. App. 1974, no writ); Sales Aff. ¶ 18.)

94. Application by Texaco to the Texas trial court to reduce the bond requirement under Rule 364 would be futile if that court followed and applied to the case the established precedents of Texas state law relating to the issue. While that court has the power, and indeed the duty to consider reduction of the bond on federal Constitutional grounds, there is no legal requirement that Texaco must request it do so, in order for Texaco to obtain relief from this Court on such Constitutional grounds.

3. *The Lack of an Effective and Meaningful Remedy in the Texas Appellate Courts*

95. Under Texas procedure, "the appellate court may review for excessiveness the amount of the bond or deposit fixed by the trial court and may reduce the amount if found to be excessive." Tex. R. Civ. P. 365(b). This provision, however, permits a Texas appellate court to reduce the amount of a bond only where the amount set by the trial court unreasonably exceeds the amount of the judgment, plus interest and costs. The provision would not allow a reduction in the bond required of Texaco below the amount of the Judgment. (*Mudd v. Mudd*, 665 S.W.2d 128, 130 (Tex. Civ. App. 1983); *Kennesaw Life & Accident Insurance Co. v. Streetman*, 644 S.W.2d 915, 917 (Tex. Civ. App. 1983); *see also* Sales Aff. ¶ 19.)

96. A petition by Texaco for an extraordinary writ in the Texas appellate courts might also be futile and is not a condition precedent to making application to this Court for relief on Constitutional grounds. It is unlikely that an intermediate appellate court would find discretion to reduce the amount of the bond in the face of an unambiguous rule, promulgated by the Texas Supreme Court, which has uniformly been interpreted to confer no such discretion. (Sales Aff. ¶ 82). Further, even if there were such discretion, "[m]andamus is not available to compel a discretionary act".

(*Washington v. McSpadden*, 676 S.W.2d 420, 422 (Tex. Crim. App. 1984).) In any event, the Texas appellate courts could not act upon any petition for an extraordinary writ in time to provide effective relief to Texaco. (Sales Aff. ¶¶ 28-35.)

97. While Texas does permit expedited appeals, the Texas appellate courts probably could not hear and determine an appeal in an action of this magnitude before the trial court's jurisdiction ceases and the provisions of Paragraph 7 expire. An expedited appeal would probably therefore be ineffective in preventing the harm threatened to Texaco. (Sales Aff. ¶¶ 21-27.)

98. [Deleted.]

99. As found below, Pennzoil has publicly admitted that Texaco's assets are currently more than sufficient to pay the Judgment. (*See* ¶ 137, *infra*.) At the same time, however, Pennzoil has been threatening to invoke the lien and bond provisions against Texaco because it believes itself entitled to do so as a matter of Texas law. On December 12, 1985, The Wall Street Journal reported that, according to Pennzoil's chairman, Mr. Liedtke, Pennzoil is " 'going to put pressure' on state Judge Solomon Casseb to permit Pennzoil to levy liens against Texaco's assets" unless Pennzoil is satisfied with Texaco's settlement proposals. (Boies Aff. ¶ 8(a) and Exhibit 3 thereto).

100. On December 16, 1985, The Wall Street Journal reported that Pennzoil's director and "legal strategist", Baine Kerr, had "charged that Texaco may have violated the standstill agreement [contained in Paragraph 7 of the Judgment] by providing letters of credit from its bankers in purchasing products and services". According to the newspaper account, Mr. Kerr stated that "letters of credit secured by Texaco's purchased products 'aren't specifically permitted under the Court agreement' ". (Boies Aff. ¶ 8(b) and Exhibit 7 thereto).

101. On December 31, 1985, The Wall Street Journal reported that "sources say [that] Pennzoil aims to send a signal

to Texaco that it is ready to begin attaching assets if it isn't satisfied with the progress of the [parties' settlement] talks". (Supp. Boies Aff. ¶ 10.)

102. From time to time in discussions with Texaco, Pennzoil has taken the position that by instituting the present federal action in this Court, Texaco may have waived its right to appeal from the Judgment in the Texas appellate courts. (Supp. Boies Aff. ¶ 8.)

III. IRREPARABLE INJURY

A. *Irreparable Injury to Texaco*

103. Texaco will suffer irreparable injury unless Pennzoil is enjoined from placing judgment liens on Texaco's property in the full amount of $13 Billion or more or executing on the Judgment in any significant amount.

104. As found above, the jury's verdict and entry of the Judgment have, despite the provisions of Paragraph 7 of the Judgment, caused a massive loss of confidence in Texaco on the part of its security holders, lenders, trade creditors, business partners and others who do business with or depend upon the company. This loss of confidence has itself caused severe and irreparable injury to Texaco. (*See* ¶¶ 49-66, *supra*.)

105. Permitting Pennzoil to place liens on Texaco's real property in the full amount sought will accelerate the existing loss of confidence in the company, cause its creditors and suppliers to withdraw or withhold funds and credit from Texaco and drain it of the working capital needed to carry on its business. The effect would probably be to force Texaco to seek protection from its creditors by filing for reorganization under Chapter 11 of the Bankruptcy Code before it can prosecute to a conclusion any appeal from the Judgment, if this Court were to deny an adequate provisional remedy to Texaco. Application of the lien provisions will therefore cause irreparable injury to Texaco. (*See* ¶¶ 71-73, *supra*.)

106. As found above, Texaco cannot obtain a supersedeas bond in the amount required by Texaco law and can post security acceptable under Texas law only by liquidating assets in a manner that would effectively dismantle the company or force it into bankruptcy. Alternatively, if Texaco were unable to post acceptable security, Pennzoil would be able to execute upon the Judgment in a manner that would as effectively liquidate and dismantle the company. Application of the bond provisions will therefore cause irreparable injury to Texaco. (*See* ¶¶ 74-81, *supra*.)

107. Because the lien and bond provisions operate independently of each other, Texaco will sustain irreparable injury unless full application of both the lien and the bond provisions is enjoined.

108. As set forth below, application of the lien and bond provisions will also cause irreparable injury to persons other than Texaco and to several distinct and important national interests. Further, the contention that the Judgment and the rule of law on which it appears to rest threaten a deterrent effect upon competitive tender offers, and thus upon the national economy, which application of the lien and bond provisions will magnify presents fair ground for litigation in this action.

B. *Irreparable Injury to Public Interests*

1. *Injury to Other Persons*

109. Texaco is the fifth largest industrial company and the third largest oil company in the United States. As of September 30, 1985, Texaco Inc. had 319,000 stockholders, who receive a $3.00 per share annual common stock dividend, totaling $730 million for 1985. Texaco currently employs about 55,000 people on a worldwide basis, with aggregate annual salaries and wages in excess of $1.6 billion. Texaco has almost 13,000 former U.S. employees who continue to receive compensation. Texaco spent $3.7 billion in 1984 for capital and exploratory expenditures. In 1984 Texaco sold approximately one billion

barrels of petroleum products worldwide, of which 414 million barrels were sold in the United States. In the United States alone, Texaco products are sold through 18,000 retail service stations. (Brinkman Aff. ¶ 3.)

110. Unless full application of the lien and bond provisions is enjoined, the bankruptcy or liquidation of Texaco will cause irreparable injury to Texaco's shareholders, employees, retirees, creditors and business partners. If Texaco enters bankruptcy, the value of its stock and debt securities will further decline. Its shareholders will be deprived of dividend income. Creditors, particularly trade creditors, may be unable to obtain their funds pending reorganization. Texaco's suppliers, customers, joint venturers and other business partners include not only other large corporations, but also thousands of smaller businesses, particularly retail service stations, which are entirely dependent upon Texaco for products and revenues. If Texaco is irreparably harmed or destroyed, most of these other enterprises may find their own businesses disrupted, and many will find their own business and financial standing irreparably impaired.

111. Responsible representatives of several states have advised the Court of the important role which Texaco plays in their states' economies. Premature enforcement of the Judgment, before Texaco has exercised its right to a meaningful appeal, will cause irreparable injury to the citizens and economic interests of those states. For example:

(a) In Alabama, Texaco does business with some 1300 suppliers and has more than $217 million in assets. It has an active oil and gas exploration program there. Premature enforcement of the Judgment would cause irreparable injury to the many persons in Alabama, including employees, suppliers and others, who depend upon Texaco's activities there. (Letter of Hon. Jeremiah Denton and Hon. Howell Heflin, dated December 18, 1985.)

(b) In California, Texaco has over 4200 employees and an annual payroll of over $141 million. Texaco does

business with more than 16,000 suppliers in California, and more than 28,000 Texaco shareholders reside there. Texaco's assets in California are valued at over $1.9 billion. Texaco is involved in many major projects in California, including sensitive enhanced oil recovery projects in the Kern River area and the federally-supported Cool Water gasification facility. Including employees, shareholders, suppliers, retail outlets and others, more than 48,000 Californians would suffer irreparable injury through premature enforcement of the Judgment. (Letters of Hon. Glenn M. Anderson, Hon. William M. Thomas and Hon. Jerry Lewis, all dated December 18, 1985.)

(c) In Delaware, Texaco has over 675 employees and an annual payroll exceeding $28 million. It pays more than $7 million in state taxes annually. It does business with some 1,000 suppliers, and more than 1200 Texaco shareholders reside there. Its assets in Delaware are valued at over $400 million. Including employees, stockholders, royalty holders, suppliers, branded retail outlets and others, some 3000 Delawareans would suffer irreparable injury through premature enforcement of the Judgment against Texaco. (Letter of Hon. Michael N. Castle, dated December 19, 1985; Letter of Hon. William V. Roth, Jr., dated December 20, 1985.)

(d) In Kansas, Texaco has 1000 employees and an annual payroll of $27 million. It does business with more than 4000 Kansas suppliers. It paid over $69 million in royalties to approximately 6700 Kansas royalty holders in 1985. Its assets in Kansas exceed $189 million. Including employees, stockholders, royalty holders, retirees, suppliers and branded retail outlets, almost 16,000 Kansans would suffer irreparable injury through premature enforcement of the Judgment against Texaco. (Letter of Kansas Congressional Delegation, dated December 18, 1985; Brief of State of Kansas as Amicus Curiae, dated December 20, 1985.)

(e) In Louisiana, Texaco has some 4400 employees and an annual payroll exceeding $162.5 million. It paid more than $107 million in state taxes in 1985 and made royalty payments to the state of some $56 million. It does business with more than 4000 suppliers in Louisiana. Its estimated 1985 cash expenditures in Louisiana were some $1.4 billion. Including employees, stockholders, royalty holders and others, thousands of Louisianans would sustain irreparable injury through premature enforcement of the Judgment. (Letter of Louisiana Congressional Delegation, dated December 16, 1985.)

(f) In New York, Texaco has over 2600 employees and an annual payroll exceeding $110 million. It paid more than $21 million in state taxes in 1984. It does business with more than 4700 suppliers in New York, and more than 30,000 Texaco shareholders reside there. Including employees, shareholders, suppliers and others, more than 37,300 New Yorkers would suffer irreparable injury through premature enforcement of the Judgment. (Letter of Hon. Hamilton Fish, Jr., dated December 18, 1985.)

(g) In Oklahoma, Texaco has some 1650 employees and an annual payroll of some $58 million. It indirectly supplies employment to more than 9,000. It paid over $124 million to Oklahoma royalty holders in 1985. Its assets in Oklahoma are valued at over $686 million. Including employees, shareholders, royalty holders, retirees, suppliers and branded retail outlets, over 41,000 Oklahomans would suffer irreparable injury through premature enforcement of the Judgment against Texaco. (Letter of Oklahoma Congressional Delegation, dated December 18, 1985; Brief of Oklahoma as Amicus Curiae, dated December 19, 1985.)

(h) In Wyoming, Texaco has some 250 employees. Approximately 1000 Texaco shareholders reside there. Approximately 2400 Wyoming residents receive royalty payments from Texaco, and the state receives some $24 million annually in taxes and royalties. Texaco's assets in

> Wyoming are valued at more than $500 million. Including employees, shareholders, royalty holders, suppliers and others, thousands of Wyoming citizens would suffer irreparable injury through premature enforcement of the Judgment. (Brief of State of Wyoming as Amicus Curiae, dated December 19, 1985.)

112. It is fair to anticipate that Texaco's bankruptcy or liquidation will cause significant injury to the national economy as a whole.

2. *Injury to Financial Markets*

113. The nation's financial markets are complicated, interdependent, volatile and sensitive. The actions and movements of these markets reflect not only measurable financial developments and directions but also emotions and attitudes which exist from time to time. (Affidavit of John F. McGillicuddy, sworn to December 19, 1985 ("McGillicuddy Aff."), ¶ 4.)

114. As found above, the mere prospect that the lien and bond provisions might be applied against Texaco prior to any appeal has caused significant disruption to markets for securities issued by Texaco and its co-venturers. (See ¶¶ 50-60, 66 *supra*.)

115. While it is impossible to predict the exact effect of Texaco's bankruptcy or liquidation upon the financial markets, it is fair to anticipate that there would be significant adverse effects. (McGillicuddy Aff. ¶ 4.)

116. [Deleted]

117. [Deleted]

3. *Injury to International Commerce*

118. As the third largest oil company in the United States, Texaco does business in some 150 foreign countries. (Affidavit of Julius L. Katz, sworn to December 19, 1985 "Katz Aff.", ¶ 7.)

119. Because of Texaco's size and the importance of its presence in major oil producing and trading regions of the world, the inability of Texaco to function in a normal manner which would result from application of the lien and bond provisions would cause a significant reduction in the role played by the United States in certain oil exporting countries. (Katz Aff. ¶ 7.)

120. In some parts of the world, the uncertainties of the situation could lead to the displacement of Texaco in favor of other entities, including non-American entities. The displacement of Texaco in important oil producing and exporting nations by foreign entities would adversely affect this country's balance of payments by reducing its earnings abroad. (Katz Aff. ¶ 8.)

121. [Deleted]

122. Although the world oil market is currently glutted, United States oil reserves have steadily declined since 1971. Over the long term, the dependence of the United States on imported oil and especially Middle Eastern oil will increase. The disruption or diminution of Texaco's present role as an important finder, producer and exporter of oil throughout the world may only make this country's oil supply less secure. (Katz Aff. ¶ 10.)

4. *Injury to National Security and Foreign Policy*

123. Many of the 150 foreign nations in which Texaco does business and owns and maintains assets are strategically significant to the national security and foreign policy interests of the United States. Many of these countries are located in areas of the world that are economically or politically unstable or are themselves economically or politically unstable. (Affidavit of Kenneth W. Dam ("Dam Aff."), sworn to December 19, 1985, ¶ 3.)

124. In addition to Texaco's importance as an American presence and source of economic stability in certain regions

throughout the world, Texaco has been and continues to be an important supplier to United States military forces in remote and strategically important areas of the world. Texaco's bankruptcy or liquidation might impair its ability to supply military forces and could thus impair national security. (Dam Aff. ¶ 4.)

125. Texaco's bankruptcy or liquidation could provide an occasion for certain host governments or opposition political groups to seek to reduce American business interests and influence in their countries by nationalizing Texaco's assets and operations or transferring them to a foreign oil company. (Dam Aff. ¶ 5.)

126. [Deleted]

127. The possibility of Texaco's destruction could prompt foreign governments or opposition political forces to take actions in anticipation of Texaco's final demise that are harmful to the national security or foreign policy of the United States. (Dam Aff. ¶ 7.)

C. *The Deterrent Effect upon Tender Offers*

The following paragraphs through 136 are contentions which present fair ground for litigation in this Court:

128. Our national economy is based upon a system of competitive capitalism in which the person who is willing to pay the highest price receives the benefit of any investment opportunity. In the context of the sale of companies, this system should encourage a public auction in which the highest bidder wins. This system allocates the nation's resources to their highest valued uses and maximizes the value of shareholders' investment in publicly held companies. (Affidavit of Lester C. Thurow ("Thurow Aff."), sworn to December 29, 1985, ¶ 5.)

129. Free and open competition for investment opportunities is constrained by the law of contracts. Once two parties have entered into a binding contract, the competition has

ended, and bidders who arrive thereafter come too late. Timely bidding is thus an important part of the competitive process. Parties to a contract must be able to rely on their contract once it has been concluded. (Thurow Aff. ¶ 6.)

130. Thus, competitive capitalism is based on two fundamental propositions:

> *First*, there should be free and open competition among parties seeking investment opportunities.
>
> *Second*, when the competition is over, the parties must be able to rely on their contracts. (Thurow Aff. ¶ 7.)

131. For this system of competitive capitalism to function properly, there must be rules specifying when the auction is still open and when it has ended. These rules must be clearly articulated and must be applied in an objective, consistent and predictable manner. Otherwise, participants in the competition cannot discern the rules and guide their conduct in accordance with them.

> (a) Rules concerning contract formation must define a reasonably clear line indicating when a contract has been created. Parties involved in negotiations must be able to determine in advance which actions will have the effect of binding them.
>
> (b) The rules governing when a party may be held liable for interfering with a contract must also be clear. Investors competing for investment opportunities must be able to determine in advance when the auction is over, and they should be held liable only when they induce a breach of contract after they know that the competition is over. (Thurow Aff. ¶ 8.)

132. Texaco has raised a serious and substantial question as to whether the jury in the *Pennzoil* action found that a contract has been created at a point in the negotiations well in advance of the point at which objective and knowledgeable investors would have said that a contract had been created. The jury apparently found a binding agreement even though

both Pennzoil and Getty Oil expressly made their "agreement in principle" subject to a definitive agreement which was never negotiated or signed. Further, the jury apparently imposed liability on Texaco despite the fact that both Pennzoil and Getty entities had publicly announced this reservation of rights and despite the fact that the Getty entities had advised Texaco that there was no prior contract and invited Texaco to bid. (Thurow Aff. ¶ 9; Affidavit of Simon P. Orme ("Orme Aff."), sworn to January 7, 1986, ¶ 2.)

133. The Judgment, if based on the above premises, would pose a significant threat to the national economy for two reasons:

(a) *First*, it would establish a rule of law greatly at variance with the rules of competitive capitalism as generally understood.

(b) *Second*, it would suggest that there may not be any reliable rules, that the rules may be whatever a local jury decides they are, and that an investor who competes runs the risk that a jury may later decide to impose massive damages because it believes the investor broke the rules. (Thurow Aff. ¶ 10.)

134. The Judgment would, therefore, introduce great uncertainty into the process by which public companies are sold. This uncertainty would deter potential bidders from entering an auction for corporate control. Once an initial offeror had begun discussion of any substance with a target company, potential competing offerors would be reluctant to make a competing offer and thereby assume the risk, potentially enormous, that they would later be determined to have interfered with arrangements with the first offeror and the target company. This reluctance would exist even where the target company clearly solicited an alternative bid and gave assurances that it had not reached a contract with the initial bidder. The potential competing offeror might be deterred even if given assurances that there had been no substantive negotiations at all with the initial bidder, given the risk that a jury might later

conclude that there had in fact been such negotiations and that they gave rise to a binding agreement. (Thurow Aff. ¶ 11; Orme Aff. ¶ 3.)

135. The uncertainty created by the Judgment would inevitably chill the competitive capitalism that is a necessary part of our national economy. (Thurow Aff. ¶ 13; Orme Aff. ¶¶ 3, 4.)

136. If, because of application of the lien and bond provisions, Texaco is unable to secure meaningful appellate review of the serious and substantial questions raised by the Judgment, the *in terrorem* effect of the Judgment of the national economy will be exacerbated. (Thurow Aff. ¶ 13.)

D. *Lack of Injury to Pennzoil*

137. Pennzoil has publicly admitted that Texaco's assets are sufficient to satisfy the Judgment even without liens or a bond.

(a) On November 22, 1985, J. Hugh Liedtke, Pennzoil's chairman, stated that Texaco's liquidation value would equal at least $22 billion, and that "he did not doubt Texaco's ability to pay the damages". (*See New York Times*, Nov. 22, 1985, Sec. D, p. 10.)

(b) In a television interview broadcast in Houston on December 5, 1985, Pennzoil's lead counsel, Joseph D. Jamail, stated:

> "Texaco's announced public assets are in excess of 23 billion dollars. And if—all they need do if they're so sure about their case, and they claim they can't post a bond, and that's not what the hearing is about, they've still got the Getty assets they took away from Pennzoil, they can post those as a—in lieu of a bond." (Affidavit of Francis P. Barron ("Barron Aff."), sworn to December 29, 1985, ¶ 3 and Exhibit 1 thereto.)

(c) In a television interview broadcast in Houston on December 6, 1985, Mr. Liedtke stated that "Texaco has 37

billion dollars in assets, appraised value of their assets". (Barron Aff. ¶ 4 and Exhibit 2 thereto.)

(d) In another television interview broadcast in Houston on December 6, 1985, Mr. Liedtke stated:

> "After paying off all the debts that they currently owe—some 11 billion dollars—they still have 26 billion and it's very adequate to cover what they owe us". (Barron Aff. ¶ 5 and Exhibit 3 thereto.)

138. As found above, full application of those provisions may likely force Texaco into bankruptcy or liquidation. (See ¶¶ 71-81, *supra*.) Such a bankruptcy or liquidation might significantly impair or delay Pennzoil's ability to recover the full amount of the Judgment.

139-142. [Deleted, see Rule 408 Fed. R. Evid, as irrelevant and privileged.]

So found as indicated except to the extent inconsistent with this Court's opinion and findings of even date.

SO ORDERED

White Plains, NY
January 10, 1986

/s/ CHARLES BRIEANT
U.S.D.J.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

86-7046, 86-7052

TEXACO, INC.,

Plaintiff-Appellee,

—v.—

PENNZOIL COMPANY,

Defendant-Appellant,

STATE OF TEXAS,

Intervenor.

JUDGMENT—Dated February 20, 1986

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of February, one thousand nine hundred and eighty-six.

Present: HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. LAWRENCE W. PIERCE
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed in part, reversed in part and remanded to the said district court for further proceedings in accordance with the opinion of this court.

Elaine B. Goldsmith,
Clerk

/s/ Edward J. Guardaro

EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TEXACO, INC.,

Plaintiff-Appellee,

—against—

PENNZOIL COMPANY,

Defendant-Appellant.

ORDER DENYING MOTION FOR RECALL OF MANDATE/CLARIFICATION, MODIFICATION OR PARTIAL STAY OF JUDGMENT

FILED—March 27, 1986

Pennzoil requests recall of the mandate, issued March 13, 1986, for a clarification, modification or stay of the judgment of this Court, entered February 20, 1986, so as to enable Pennzoil to seek relief in the Texas courts other than enforcement of the judgment.

By: /s/ Laurence H. Tribe/BSK
LAURENCE H. TRIBE

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

/s/ J. Edward Lumbard
/s/ Walter R. Mansfield
/s/ Lawrence W. Pierce
Circuit Judges

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

86-7046, 86-7052

TEXACO, INC.,

Plaintiff-Appellee,

—against—

PENNZOIL COMPANY,

Defendant-Appellant,

STATE OF TEXAS,

Intervenor.

NOTICE OF APPEAL—Dated March 21, 1986

PLEASE TAKE NOTICE that defendant-appellant Pennzoil Company hereby appeals to the Supreme Court of the United States from the final judgment entered by the United States Court of Appeals for the Second Circuit on February 20, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated: New York, New York
March 21, 1986

LAURENCE H. TRIBE, ESQ.

By /s/ Laurence H. Tribe/BSK

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APPENDIX I

DISTRICT COURT OF
HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 84-05905

PENNZOIL COMPANY

Plaintiff,

—VS.—

TEXACO INC.,

Defendant.

JUDGMENT—Dated December 10, 1985

BE IT REMEMBERED that the above entitled and numbered cause came on for trial by jury before the 151st Judicial District Court, on the 9th day of July, 1985, and the trial thereof proceeded with the selection of a jury duly qualified, empaneled and sworn, the introduction of evidence and the taking of testimony until both sides rested and closed and so announced in open court; whereupon the Court duly charged and instructed the jury concerning all matters of fact submitted to the jury upon special issues, to which the jury unanimously made findings of fact in favor of plaintiff, Pennzoil Company, in all respects and against the defendant, Texaco Inc., which findings of the jury are set forth in the charge of the Court and verdict of the jury as heretofore received and filed by the Court, which charge and verdict are hereby incorporated in full as part and parcel of the Judgment of this Court as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that at the end of the Getty Oil board meeting of January 3, 1984, Pennzoil and each of the Getty entities, to wit, the Getty Oil Company, the Sarah C. Getty Trust and the J. Paul Getty Museum, intended to bind themselves to an agreement that included the following terms:

a. all Getty Oil shareholders except Pennzoil and the Sarah C. Getty Trust were to receive $110 per share, plus the right to receive a deferred cash consideration from the sale of ERC Corporation of at least $5 per share within five years;

b. Pennzoil was to own 3/7ths of the stock of Getty Oil and the Sarah C. Getty Trust was to own the remaining 4/7ths of the stock of Getty Oil; and

c. Pennzoil and the Sarah C. Getty Trust were to endeavor in good faith to agree upon a plan for restructuring Getty Oil on or before December 31, 1984, and if they were unable to reach such agreement then they would divide the assets of Getty Oil between them also on a 3/7ths - 4/7ths basis.

Answer: "We Do"

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that Texaco knowingly interfered with the agreement between Pennzoil and the Getty entities, if you have so found?

Answer: "We Do"

SPECIAL ISSUE NO. 3

What sum of money, if any, do you find from a preponderance of the evidence would compensate Pennzoil for its actual damages, if any, suffered as a direct and natural result of Texaco's knowingly interfering with the agreement between Pennzoil and the Getty entities, if any?

Answer: "7.53 billion"

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that Texaco's actions, if any, were intentional, willful and in wanton disregard of the rights of Pennzoil, if any?

Answer: "We Do"

SPECIAL ISSUE NO. 5

What sum of money, if any, is Pennzoil entitled to receive from Texaco as punitive damages?

Answer: "$3 billion"

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that at the end of the Getty Oil Company Board meeting on January 3, 1984, the Getty Oil Company, the Museum, the Trust, and Pennzoil each intended to be bound to an agreement which provided that the Getty Oil Company would purchase the Museum shares forthwith as provided in the "Memorandum of Agreement"?

Answer: "We Do"

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that at the end of the Getty Oil Board meeting on January 3, 1984, the Getty Oil Company, the Museum, the Trust, and Pennzoil each intended to be bound to an agreement which provided for Pennzoil to have an option to purchase 8 million shares of Getty Oil Company stock as provided in the "Memorandum of Agreement"?

Answer: "We Do"

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that the payment of $110 in cash per share plus the ERC stub was not a fair price as of January 3, 1984?

Answer: "It was a fair price."

Plaintiff having moved the Court for entry of judgment on the verdict and the Court having considered such motion together with all opposing motions and arguments of counsel for the defendant with respect thereto, it is hereby ordered, judged and decreed that plaintiff's Motion for Judgment on the Jury Verdict be and the same is hereby granted and that the Judgment of this Court is as follows:

1. Plaintiff, Pennzoil Company, shall have and recover of and from the Defendant, Texaco Inc., the sum of Seven Billion, Five Hundred and Thirty Million Dollars ($7,530,000,000.00) as its actual damages; and

2. In addition to the foregoing, Plaintiff, Pennzoil Company, shall have and recover from Defendant, Texaco Inc., the sum of Six Hundred Twenty-Four Million, Seven Hundred Fifty-Three Thousand, Six Hundred Sixty-Two Dollars ($624,753,662.00) as prejudgment interest on the recovery outlined in paragraph 1 above, less the offset in paragraph 4 below, calculated under New York law at the simple rate of nine percent (9%) per annum beginning January 6, 1985, to and including December 9, 1985; and

3. In addition to the foregoing, Plaintiff, Pennzoil Company, shall have and recover of and from Defendant, Texaco Inc., the sum of Three Billion Dollars ($3,000,000,000.00), as punitive damages; and

4. In addition, the total award to Pennzoil set out in paragraphs 1, 2 and 3 above shall be reduced by Thirty-Three Million, Seven Hundred and Seventy-Seven Thousand, Five Hundred and Fifty-One Dollars and Seventeen Cents ($33,777,551.17), pursuant to the terms of the stipulation entitled Admissions of Pennzoil Company filed in this case; and

5. The total sum of the judgment hereby granted Plaintiff, Pennzoil Company, against Defendant, Texaco Inc., being the sum of awards set out in paragraphs 1, 2 and 3 above, after allowance for the reduction set

out in paragraph 4 above, is Eleven Billion, One Hundred Twenty Million, Nine Hundred Seventy-Six Thousand, One Hundred Ten Dollars and Eighty-Three Cents ($11,120,976,110.83). In addition, Plaintiff, Pennzoil Company, shall have and recover from the Defendant, Texaco Inc., postjudgment interest on said total sum of judgment at the simple rate of ten percent (10%) per annum from the date of judgment until paid; and

6. It is further ordered, judged and decreed that all costs incurred will be taxed against the Defendant, Texaco Inc.; and

7. In order to preserve the status quo of this proceeding during the pendency of this matter before this Court, the Court hereby ORDERS AND DECREES as follows:

   (a) Pennzoil shall not abstract, or request, or attempt to file any abstract of Judgment in this matter or file, register, levy or execute thereon or otherwise attempt to collect the Judgment in the State of Texas or elsewhere by reason of this Judgment by this Court in the matter without permission of this Court.

   (b) Texaco shall not pledge, encumber, convey, or otherwise dispose of any of its assets other than in the routine and ordinary course of business without permission of this Court. Financing involving sale or pledges of receivables or inventory are agreed to be in the ordinary course of business.

   (c) Texaco shall keep intact and not encumber, except in the routine and ordinary course of business, any of the properties and assets now owned by Texaco which were formerly owned by Getty Oil Company and its affiliate entities without permission of this Court.

   (d) If Pennzoil is found, after notice and hearing, to have violated this paragraph 7, Texaco shall be granted a new Trial.

(e) If Texaco files a petition under Title 11 of the U.S. Code, or if Texaco after notice and hearing is found to have violated this paragraph 7, then this paragraph 7 shall be of no further force or effect.

(f) No modification or vacation of this paragraph 7 shall be made except upon reasonable notice and hearings, and signed Order in the presence of both parties in open court.

(g) This paragraph 7 shall remain in effect and binding upon Texaco and Pennzoil so long as this matter is within the jurisdiction of this Court.

SIGNED AND ENTERED this 10th day of December, 1985 at Houston, Harris County, Texas, as the Judgment of the Court in this cause.

/s/ SOLOMON CASSEB, JR.
Solomon Casseb, Jr.,
Judge Presiding

The parties hereto agree to and approve the above paragraphs 7(a) through (g).

[signatures of parties]

APPENDIX J

DISTRICT COURT OF
HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 84-05905

PENNZOIL COMPANY,

Plaintiff,

—v.—

TEXACO INC.,

Defendant.

PENNZOIL STIPULATION—Dated December 20, 1985

Pennzoil Company, plaintiff in this action, hereby presents the Court the following stipulation concerning the judgment the Court entered in this action on December 10, 1985:

> "Pennzoil stipulates and agrees that, if Texaco seeks to supersede or stay the enforcement of this judgment and it makes provisions to secure the judgment which the Texas courts determine would meet the standards of Fed. R. Civ. P. 62, Pennzoil will be bound by any stay that the Texas courts enter based on a finding that Texaco has provided security which meets the standards of Fed. R. Civ. P. 62."

WHEREFORE, Pennzoil requests that the Court accept this stipulation.

Respectfully submitted,

BAKER & BOTTS

By/s/ JOHN L. JEFFERS

John L. Jeffers
TBA #10603000
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1360

APPENDIX K

ARTICLE 1, SECTION 13 OF THE TEXAS CONSTITUTION

provides in relevant part:

> All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

APPENDIX L

TITLE 42, SECTION 1983 OF THE UNITED STATES CODE

§ 1983. *Civil action for deprivation of rights.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX M

TITLE 28, SECTION 1257 OF THE UNITED STATES CODE

§ 1257. *State courts; appeal; certiorari*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

APPENDIX N

TEXAS GOVERNMENT CODE

§ 22.002. *Writ Power*

(a) The supreme court or a justice of the supreme court may issue writs of procedendo and certiorari and all writs of quo warranto and mandamus agreeable to the principles of law regulating those writs, against a district judge, a court of appeals or a justice of a court of appeals, or any officer of state government except the governor, the court of criminal appeals, or a judge of the court of criminal appeals.

* * * *

APPENDIX O

RULE 62 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 62. *Stay of Proceedings to Enforce a Judgment*

(a) *Automatic Stay; Exceptions—Injunctions, Receiverships, and Patent Accountings.* Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) *Stay on Motion for New Trial or for Judgment.* In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) *Injunction Pending Appeal.* When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of

the adverse party. If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

(d) *Stay Upon Appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) *Stay in Favor of the United States or Agency Thereof.* When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.

(f) *Stay According to State Law.* In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state.

(g) *Power of Appellate Court Not Limited.* The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) *Stay of Judgment as to Multiple Claims or Multiple Parties.* When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.